

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TRISHA WREN, ET AL.,

Case No. C-06-5778 JCS (CONSOLIDATED)

Plaintiff(s),

v.

RGIS INVENTORY SPECIALISTS,

Defendant(s).

This Order Relates to:

ALL CASES

**ORDER RE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [Docket No. 403]; DEFENDANT RGIS, LLC'S MOTION TO DECERTIFY COLLECTIVE ACTION [Docket No. 569]; PLAINTIFFS' MOTION TO BIFURCATE ISSUES AT TRIAL [Docket No. 413]; DEFENDANT'S MOTION TO DISMISS INVALID-OPT-IN PLAINTIFFS [Docket No. 586]; AND RELATED MOTIONS TO STRIKE [Docket Nos. 481, 528, 570, 614 and 664].****I. INTRODUCTION**

In this consolidated action, Plaintiffs assert claims on behalf of employees of Defendant RGIS Inventory Specialists ("RGIS") under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, as well as state law. The parties have consented to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). In an order filed December 20, 2007, the Court granted conditional certification of two opt-in classes under the FLSA ("the Opt-in classes"). Plaintiffs now seek certification under Rule 23 of the Federal Rules of Civil Procedure of at least four classes asserting state law claims ("the Rule 23 classes"). Defendant opposes certification of the Rule 23 classes and further, asks the Court to decertify the classes that were previously certified under the FLSA.

Currently before the Court are the following motions: 1) Plaintiffs' Motion for Class Certification [Docket No. 403] ("Rule 23 Motion"); 2) Defendant RGIS, LLC's Motion to Decertify Collective Action [Docket No. 569] ("Decertification Motion"); 3) Plaintiffs' Motion to Bifurcate Issues at Trial [Docket No. 413] ("Motion to Bifurcate"); and 4) Defendant's Motion to Dismiss

Invalid-Opt-In Plaintiffs [Docket No.586] (“Motion to Dismiss”). In addition, in connection with these motions, the parties have filed numerous motions to strike and evidentiary objections.<sup>1</sup> A hearing on the Motions was held on Friday, January 9, 2009 at 9:30 a.m.

## II. BACKGROUND

This consolidated action began as two separate purported class actions: 1) *Wren v. RGIS Inventory Specialists*, Case No. C-06-05778, initiated on September 20, 2006; and 2) *Piper v. RGIS Inventory Specialists*, Case No. C-07-00032, filed January 4, 2007. On June 6, 2007, the Court consolidated the two actions, and a consolidated complaint was filed on June 26, 2007 (“Consolidated Complaint”).

Plaintiffs allege that Defendant RGIS is “the world’s largest inventory company,” with over 400 offices worldwide and over 400,000 employees. Consolidated Complaint, ¶ 4. In the United States, RGIS has 258 offices, including 24 in California, 3 in Oregon, and 5 in Washington. *Id.* Plaintiffs are “current and former employees of RGIS who have been employed as hourly employees in the positions of inventory ‘auditors,’ ‘product specialists,’ ‘merchandising specialists,’ ‘assistant team leaders,’ ‘team leaders,’ and/or ‘associate’ or ‘assistant area managers,’” referred to by Plaintiffs as “Auditor Employees.” *Id.*, ¶ 2.<sup>2</sup>

The following individuals are named as representative plaintiffs in the Consolidated Complaint:

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<sup>1</sup>Defendants have filed the following objections and motions to strike: 1) Defendant RGIS, LLC’s Objections to Evidence Submitted in Support of Plaintiffs’ Motion for Class Certification Pursuant to F.R.C.P. Rule 23 [Docket No. 452]; 2) Defendant RGIS, LLC’s Motion to Strike Plaintiffs’ Reply Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Class Certification [Docket No. 528]; 3) Defendant RGIS, LLC’s Objections to Evidence in Support of Plaintiffs’ Reply Memorandum in Support of Motion for Class Certification [Docket No. 540]; 4) Defendant RGIS, LLC’s Objections to Evidence Submitted in Support of Plaintiffs’ Opposition to RGIS’ Motion to Decertify Class Action [Docket No. 633]. Plaintiffs have filed the following motions to strike: 1) Motion to Strike Defendant’s Evidence Pursuant to Federal Rule of Civil Procedure 37 [Docket No. 481]; 2) Motion to Strike Portions of the Slottje Rebuttal Report and Documents Submitted in Opposition to Plaintiff’s Motion Pursuant to Federal Rule of Civil Procedure 37 [Docket No. 570]; 3) Motion to Strike Defendant’s Evidence Pursuant to Federal Rule of Civil Procedure 37 [Docket No. 614]; 4) Motion to Strike Defendant’s Evidence Pursuant to Federal Rule of Civil Procedure 37 [Docket No. 664].

<sup>2</sup> The Consolidated Complaint also alleges that Plaintiffs include certain salaried employees who should have been classified as hourly employees and that due to the misclassification, they have been improperly denied overtime pay and rest and meal breaks. Consolidated Complaint, ¶¶ 2-3.

- 1 1. Trisha Wren (allegedly worked for RGIS in Oregon and California as an hourly employee  
2 between November 1999 and September 2004);
- 3 2. Kevin Barnes (allegedly worked for RGIS in Oregon as an hourly employee between June  
4 1996 and July 2001 and thereafter as a salaried employee until April, 2005);
- 5 3. Brent Whitman (allegedly worked for RGIS in Oregon as an hourly employee between May  
6 1999 and September 1999 and in Washington as an hourly employee between September  
7 2003 and February 2004);
- 8 4. Kathlene Feige (allegedly worked for RGIS in California as an hourly employee between  
9 1998 and 2003);
- 10 5. Lisa Cunningham-Gibson (allegedly worked for RGIS in California as an hourly employee  
11 between 2001 and 2004);
- 12 6. Cynthia Piper (allegedly has worked for RGIS in California as an hourly employee since  
13 1995 and is a current employee);
- 14 7. Tephine Saite (allegedly is a current employee of RGIS in California and formerly worked  
15 in Oregon);
- 16 8. Margaret Cruz Boze (allegedly is a current employee of RGIS in California);
- 17 9. Michelle Pease (allegedly is a current employee of RGIS in California);
- 18 10. Kimberly Cassara (allegedly worked for RGIS in Florida from 2001 to 2006 and in  
19 Mississippi between January 2006 and September 2006);
- 20 11. Rabecka Sheldranti (allegedly is a current employee of RGIS in Florida);
- 21 12. Victoria Thompson (allegedly worked for RGIS in Georgia and North Carolina);
- 22 13. Melanie Manos (allegedly worked for RGIS in Pennsylvania until November 2006 and  
23 during that time also worked at inventory sites in New York and Ohio);
- 24 14. Norma Garcia (allegedly is a current employee of RGIS in California);
- 25 15. Cheryl Pierson (allegedly is a current employee of RGIS in California);
- 26 16. Sally Rosenthal (allegedly is a current employee of RGIS in California);
- 27 17. Nicole Verbick (allegedly is a former employee of RGIS in Illinois);
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18. Tammy Schnars (allegedly is a current employee of RGIS in Pennsylvania and has worked at inventory sites in Pennsylvania, New York and Ohio);

19. Margaret Martinez (allegedly is a current employee of RGIS in Colorado and has worked at inventory sites in Colorado, Kansas, Nebraska, South Dakota, Wyoming, New Mexico, Utah, and Hawaii).

Consolidated Complaint, ¶¶ 14-32.

According to Plaintiffs, the “vast majority of RGIS’ employees are ‘auditors,’ whom RGIS employs to measure and record the inventories of retail establishments.” *Id.*, ¶ 42. These inventories are performed at the retail stores and are classified as either “local inventories” or “travel/meet” inventories. *Id.*, ¶ 33. With respect to the former, RGIS does not provide transportation for its employees. *Id.* For the latter, RGIS establishes a “meet site,” where employees assemble at a specific time to be transported to the inventory site, either in an RGIS-owned vehicle or in car-pools arranged by RGIS. *Id.*

Plaintiffs allege that RGIS’ compensation policies violate both the FLSA and various state laws with respect to travel time, waiting and donning time and rest and meal breaks. In particular, Plaintiffs assert the following claims:

#### **California Law**

- Failure to provide rest periods: Cal. Lab. Code §§ 226.7 and 516 (Claim One)
- Failure to provide meal periods: Cal. Lab. Code §§ 226.7, 512 and 516 (Claim Two)
- Failure to pay wages: Cal. Lab. Code § 218 (Claim Three)
- Late payment of wages: Cal. Lab. Code §§ 201, 202 and 203 (Claim Four)
- Failure to pay minimum wage: Cal. Lab. Code §§ 512, 1194, 1194.2 and 1197 (Claim Five)
- Failure to pay overtime: Cal. Lab. Code §§ 510, 512 and 1194 (Claim Six)
- Failure to provide itemized wage statements: Cal. Lab. Code § 226 (Claim Seven)
- Unfair Competition: Cal. Bus. & Prof. Code §§ 17200 *et seq.* (Claim Eight)
- Private Attorneys General Act of 2004, Cal. Lab. Code §§ 2698 *et seq.* (Claim Nine)

#### **Illinois Law**

- Failure to pay overtime and straight time wages: Illinois Minimum Wage Law, 820 ILCS 105/1 *et seq.*, Illinois Administrative Code, 56 Ill. Admin. Code § 210.110 *et seq.* and Wage Payment and Collection Act, 820 ILCS 115/1, *et seq.* (Claim Ten)

#### **Oregon Law**

- Unpaid wage claim and statutory penalty wages: ORS §§ 652.120, 653.010 and 653.055 (Claim Eleven)
- Late payment statutory penalty wages: ORS § 652.140 (Claim Twelve)
- State minimum wage claim and statutory penalty wages: ORS §§ 653.025 and 653.055 (Claim Thirteen)
- State overtime claim under ORS §§ 653.261 and 653.055; OAR § 839-020-0030 (Claim Fourteen)
- Contract claim for rest breaks (Claim Fifteen)
- Contract claim for meal periods (Claim Sixteen)
- Breach of duty of good faith and fair dealing (Claim Seventeen)
- Permanent Injunction (Claim Eighteen)

#### **Washington Law**

- Failure to provide rest breaks: RCW §§ 49.52.050, 49.52.070 (Claim Nineteen)
- Failure to provide meal breaks: RCW §§ 49.52.050, 49.52.070 (Claim Twenty)
- Failure to provide duty free meal periods: RCW §§ 49.52.050, 49.52.070 (Claim Twenty-One)
- Failure to pay all wages when due upon termination: RCW § 49.48.010 (Claim Twenty-Two)
- Unpaid overtime wages (Claim Twenty-Three)
- Permanent injunction (Claim Twenty-Four)

#### **FLSA**

- Failure to pay minimum wage under 29 U.S.C. §§ 206 and 215(a) (Claim Twenty-Five)

- Failure to pay overtime wages under 29 U.S.C. §§ 206 and 215(a) (Claim Twenty-Six)

Plaintiffs seek to recover unpaid wages, liquidated and punitive damages, attorneys' fees and costs. Consolidated Complaint at 46-48. They also request injunctive relief prohibiting further violations of state and federal law. *Id.*

### **III. THE MOTIONS**

#### **A. Rule 23 Motion**

##### **1. Plaintiffs' Motion**

In their Rule 23 Motion, Plaintiffs seek certification of the following four classes of auditor employees employed by RGIS:

1. All hourly Auditors, Assistant Team Leaders, Team Leaders and Associate area managers employed by RGIS in California on or after January 1, 2005;
2. All hourly Auditors, Assistant Team Leaders, Team Leaders and Associate area managers employed by RGIS in Oregon on or after September 20, 2000;
3. All hourly Auditors, Assistant Team Leaders, Team Leaders and Associate area managers employed by RGIS in Washington on or after September 20, 2003;
4. All hourly Auditors, Assistant Team Leaders, Team Leaders and Associate area managers employed by RGIS in Illinois on or after January 4, 2000.

Plaintiffs also seek appointment of the following class representatives:<sup>3</sup>

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<sup>3</sup>Carol Molmen, Joan Johnson and Latonia Williams were not named as plaintiffs in the Consolidated Complaint but have opted in to the FLSA class in the last four months. *See* Rule 23 Motion at 38. Plaintiffs will seek leave to amend to add these plaintiffs if the Court finds that they are appropriate class representatives. The declarations of all the proposed class members are exhibits to the Appendix of Auditor Declarations [docket no. 418]. The declarations of Joan Johnson, Latonia Williams and Carol Molmen are found at exhibits 81, 99 and 127, respectively. Joan Johnson states that she is a current employee of RGIS in Illinois and has worked as an auditor since 2002. Latonia Williams states that she worked as an auditor for RGIS in Illinois between March 2005 and October 2006. Carol Molmen states that she worked as an RGIS auditor in Washington between June 2001 and October 2007. In addition, as noted below, in their Reply brief, Plaintiffs state that Jewel Gatlin and Michael Zustak are willing to serve as class representatives. Gatlin is a current RGIS employee who has worked as an auditor in Washington since October 2002. *See* Appendix of Declarations [docket no. 491], Ex. N. Zustak is a current RGIS employee who has worked as an auditor in Oregon for 13 years. *Id.*, Ex. S.

1. **California class:** Cynthia Piper, Sally Rosenthal, Norma Garcia, Michele Pease, Lisa Cunningham-Gibson and Cheryl Pierson.
2. **Oregon class:** Kevin Barnes, Tephine Saïtes.
3. **Washington class:** Carol Molmen.
4. **Illinois Class:** Nicole Verbick, Joan Johnson and Latonia Williams.

Finally, Plaintiffs seek an order appointing the following firms as class counsel:

1. Schneider Wallace Cottrell Bayton Konecky LLP.
2. Grady Schneider & Newman LLP.
3. Bailey Pinney PC.
4. Goldstein Demchak Baller Borgen & Dardarian.

Plaintiffs argue that class certification should be granted as to the four proposed classes because all of the requirements of Rule 23(a) are met – numerosity, common questions, typicality and adequacy of representation – and the requirements of Rule 23(b)(2) and/or (3) are also met.

Plaintiffs assert that the numerosity requirement is met based on evidence that there are at least 1,500 auditor employees in each of the states for which Rule 23 class certification is sought (the “Rule 23 States”). *See* Declaration of Richard Drogin (“Drogin Decl.”), Docket No. 406, ¶ 4 (stating that there are inventory shifts for 17,167 RGIS employees in California, 10,123 RGIS employees in Illinois, 1,548 employees in Oregon and 3,033 employees in Washington during the relevant class periods).

Plaintiffs argue further that there are common questions of law and fact that satisfy the requirements of Rule 23(a). According to Plaintiffs, these include the following issues:

1. **Whether RGIS has violated the laws of the Rule 23 States by failing to adopt a policy that prohibits off-the clock work and, in particular, failing to ensure that RGIS auditors are paid for donning time and waiting time.** According to Plaintiffs, all four states require employers to pay for work that the employer “suffers” or “permits,” including any time that employees spend donning equipment or periods during which employees are engaged to wait prior to performing other job duties. Under these laws, employers must promulgate a rule against off-the-clock work and take sufficient steps to ensure that



employees are paid for all hours worked. Plaintiffs argue that RGIS violates these laws, citing the following evidence:

- Neither the Auditor's Handbook nor the Field Policy Manual – both of which apply to all RGIS employees throughout the United States and all districts in the United States – has a written policy against off-the-clock work and there are no local written policies regarding wage and hour compliance. *See* Declaration of Andrew P. Lee in Support of Plaintiff's Motion for Class Certification ("Lee Rule 23 Decl."), Ex. 1 (June 2002 Auditor's Handbook);<sup>4</sup> Ex. 2 (March 2004 Auditor's Handbook); Ex. 4 (December 2001 Field Policy Manual); Ex. 5 (November 2005 Field Policy Manual);<sup>5</sup> Ex. 26 (Deposition of Cynthia Myers, September 26, 2007 ("Myers 9/07 Depo.)) at 24, 109 (30(b)(6) witness testifying that Auditor's Handbook and November 2005 Field Policy Manual are applicable to the entire United States); Ex. 28 (Deposition of John L. Seiss, Jr., March 25, 2008 ("Seiss Depo.)) at 124 (30(b)(6) witness testifying that local districts are not permitted to make their own pay and timekeeping policies but rather must follow the Field Policy Manual).
- RGIS managers are all trained using training manuals that are generated by corporate headquarters. Lee Rule 23 Decl., Ex. 39 (Deposition of Paul C. Landry, March 26, 2008 ("Landry Depo.)) at 29, 51, 61. These training manuals expressly state that auditors must "arrive at the inventory in time to be prepared to start counting at the designated start time." Lee Rule 23 Decl., Ex. 6 (Team Leader Training – Trainer

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<sup>4</sup>RGIS objects to Plaintiff's reliance on the 2002 version of the Auditor's Handbook on the grounds that it was superseded by later versions in 2003, 2004 and 2007 and thus was no longer in force when the class periods for California, Illinois and Washington commenced. Defendant does not object to the March 2004 version, however. *See* Lee Motion Decl, Ex. 2. The Court also notes that the 2002 version *is* relevant for the Oregon class, which RGIS implicitly concedes in its objections.

<sup>5</sup>RGIS objects to Plaintiffs' reliance on the Field Policy Manual – both the 2001 and 2005 versions – because it does not expressly state that it applies to Auditors, Assistant Team Leaders and Team Leaders. Docket # 452 at 2-3; *see also* Lee Rule 23 Decl., Ex. 4 (2001 Field Policy Manual) & Ex. 5 (2005 Field Policy Manual).



Reference Manual) at RGIS WRN 02727.<sup>6</sup> According to 30(b)(6) witness Cynthia Myers, RGIS auditors are expected to have donned their equipment by the inventory start time. Lee Rule 23 Decl., Ex. 26 (9/07 Meyers Depo.) at 66. Yet the training materials do not state anywhere, according to Plaintiffs, that auditors should be signed in *before* they don their equipment rather than at the inventory start time.

- The Auditor's Handbook specifies that the "time-in" for the purpose completing time sheets is the inventory start time, even though the Handbook also specifies that auditors must have already donned equipment and received instructions *prior* to the inventory start time. Lee Rule 23 Decl., Ex. 2 (March 2004 Auditor's Handbook) at 16, 18; *see also* Ex. 23 (miscellaneous policy directives reminding auditors that they are expected to be ready to count at start time).<sup>7</sup>
- As a practical matter, auditors are not being paid for donning and waiting time, Plaintiff's assert. In support of this assertion, Plaintiffs cite to deposition testimony and declarations of current and former district and area managers, interrogatory responses and declarations of auditors, and Pay Inquiry Forms filed by auditors regarding unpaid work time. *See* Lee Declaration, Exs. 30-41 (manager deposition transcripts); Appendix of Salaried Manager Declarations; Declaration of Camilla Roberson in Support of Plaintiffs' Motion for Class Certification ("Roberson Rule 23 Motion Decl."), ¶ 5 (summarizing interrogatory responses of opt-in plaintiffs and stating that of the 234 individuals who provided opt-in responses to interrogatories, 178 signed in using paper time sheets and 165 of these, that is, 92.7 %, stated that

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<sup>6</sup>RGIS objects to Plaintiffs' reliance on RGIS WRN 02727 on the basis that it addresses situations where employees arrive *after* the start-time of an inventory and therefore is not relevant to RGIS' policies regarding donning and wait-time *prior* to the inventory start time. *See* Docket No. 452 at 6. RGIS is incorrect. This document contains the following statement under the subheading "Auditors:" "Arrive at the inventory in time to be prepared to start counting at the designated start time." There is no indication this statement addresses arrival after the start time, as RGIS asserts.

<sup>7</sup>RGIS objects to many of the documents contained in Exhibit 23. In addition, in their Opposition to the Rule 23 Motion they assert that only 4 of the 28 documents come from districts that are at issue in this case – 3 from California and 1 from Illinois. The remaining 24 documents, they assert, come from states not at issue in this case. *See* Sager Opposition Decl., Exs. A-U.

they had signed in or been signed in after donning their equipment); Appendix of Opt-In Interrogatory Responses [docket no. 412]; Declaration of Nancy Park in Support of Plaintiffs' Motion for Class Certification ("Park Rule 23 Motion Decl."), ¶¶ 9-10 (summarizing declarations of 139 auditors from California, Washington, Oregon and Illinois and quoting declarations indicating that auditors in all four states were not permitted to clock in until after they had donned equipment); <sup>8</sup> Lee Rule 23 Decl., Ex. 8 (Pay Inquiry Forms).<sup>9</sup>

- The expert testimony of Plaintiffs' Industrial Organizational Psychologist, Dr. Richard Martell indicates that RGIS has created and maintained common corporate policies regarding compensation of RGIS auditors throughout the United States, as well as a common culture, both of which are deficient with respect to ensuring that auditors are paid for all time worked. *See* Expert Report of Richard Martell, Ph.D.<sup>10</sup>

In light of this evidence, Plaintiffs assert, the claims of the plaintiffs in the proposed classes turn on a number of common questions of law and/or fact, including whether donning time or wait time prior to the inventory should be considered "work" under applicable law, whether RGIS' policies and procedures are adequate to ensure that auditors are paid for all donning and wait time, whether RGIS knew or should have known its auditors were doing work off the clock, whether the failure to pay donning and wait time also resulted in failure to pay overtime compensation, and the pay rate applicable to donning time.

2. **Whether inaccurate time and payroll records shows a pattern and practice of violating state wage and hour requirements.** Plaintiffs cite to a statistical analysis by their expert, Dr. Drogin, in which Dr. Drogin concludes that RGIS' time and payroll records reveal patterns of inaccurate record-keeping that support Plaintiffs' claims. *See* Declaration of

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<sup>8</sup>RGIS objects to Plaintiffs' reliance on the auditor declarations on numerous grounds. *See* Docket No. 452 at 17-36.

<sup>9</sup>RGIS objects to Plaintiffs' reliance on the Pay Inquiry Forms. *See* Docket No. 452 at 3.

<sup>10</sup>RGIS objects to Dr. Martell's expert report under Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Richard Drogin (“Drogin Decl.”). Dr. Drogin’s finds that 32.7% of employee sign-out times and 53% of vehicle return times are exactly on the hour, half-hour and quarter-hour. *Id.*, ¶¶ 7, 9. These patterns in RGIS time-keeping, Plaintiffs assert, are implausible on their face and support Plaintiffs’ claims that RGIS managers do not record auditor time accurately. Dr. Drogin also finds that the time records of 4,645 auditors is missing from the time and payroll records produced by RGIS, supporting the conclusion that there is a widespread pattern on the part of RGIS of altering or falsifying auditor time records.<sup>11</sup> Finally, Plaintiffs assert that there is a common issue under the laws of the Rule 23 States as to whether RGIS’s standard pay statement meets the requirements of those states as to itemization of time and pay rates. *See* Lee Motion Decl., ¶ 9 & Ex. 7 (sample RGIS pay statements).

3. **Whether RGIS’ policy relating to pay for travel time that exceeds two hours is unlawfully arbitrary.** Plaintiffs argue that RGIS violates the laws of the four states requiring that all time worked be compensated by unreasonably classifying the first hour of transportation to and from a work site as “commute” time, even though the average commute time for the nation as a whole and for each of the four states is significantly less than an hour. *See* Lee Rule 23 Decl., Ex. 2 (Auditor’s Handbook) at 18-19. With respect to the data concerning commute times, Plaintiffs rely on the report of their expert, Marc Bendick, Jr.<sup>12</sup>
4. **Whether RGIS has engaged in a pattern or practice of failing to provide auditors with meal periods.** Plaintiffs point to Dr. Drogin’s analysis of RGIS’ wage and compensation data, in which Dr. Drogin found 75,317 instances of missed meal periods and 19,383 meal periods that were too short to comply with applicable law. *See* Drogin Decl., ¶¶ 11 & 12, Appendices 5 & 6. According to Plaintiffs, RGIS’ own documents reflect that the missed meal periods were not waived. *Id.*

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<sup>11</sup>Plaintiffs note that they have filed motions to compel production of the missing records and intend to submit a supplemental report by Dr. Drogin once he has had the opportunity to analyze any additional data produced by RGIS.

<sup>12</sup>RGIS objects to Dr. Bendick’s expert report under Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

1 Plaintiffs assert that the class representatives also meet the typicality requirement because  
2 their claims are “reasonably coextensive” with the claims of the absent class members. In particular,  
3 Plaintiffs assert that the claims of the proposed class representatives are typical of those of the  
4 classes as a whole because: 1) as a factual matter, the claims of the class representatives and the  
5 claims of the class are based on the same RGIS policies and procedures regarding compensation of  
6 auditors; 2) the claims of the class representatives and the claims of the class are based on the same  
7 legal theory, that is, that RGIS failed to pay them for all hours worked; and 3) the class  
8 representatives and the class members suffered similar injury in that they were not compensated for  
9 all hours worked. Plaintiffs note that three of the proposed class representatives – Carol Molman  
10 (Washington), Joan Johnson (Illinois) and Latonia Williams (Illinois) are not named plaintiffs.  
11 Plaintiffs state that they will seek leave to amend to add these individuals to the complaint if the  
12 Rule 23 Motion is granted.

13 Plaintiffs argue that they also satisfy the adequacy of representation requirement because the  
14 proposed class representatives do not have conflicts of interest with the class as a whole and because  
15 Plaintiffs are represented by qualified and competent counsel.

16 With respect to Rule 23(b)(2), allowing a class action to be maintained based on the  
17 possibility that injunctive relief may be appropriate, Plaintiffs assert that a class action is allowable  
18 because, in addition to damages, Plaintiffs seek meaningful declaratory and injunctive relief,  
19 namely, an order requiring that Defendant RGIS alter its policies to ensure that auditors are paid for  
20 all hours worked. Plaintiffs acknowledge that they also seek damages but argue that class  
21 certification is appropriate under Rule 23 (b)(2) so long as damages are not the “predominant” relief  
22 sought.

23 Plaintiffs argue that the requirements of Rule 23(b)(3) are met as well because common  
24 questions of law and fact relating to RGIS’ policies and procedures predominate over individual  
25 questions of damages and a class action is “superior to other available methods for fairly and  
26 efficiently adjudicating the controversy.” With regard to the former requirement, Plaintiffs point to  
27 the common legal and factual questions discussed above. As to the latter requirement, Plaintiffs  
28 argue that a class action is superior because otherwise hundreds, or even thousands, of actions would

1 have to be brought, straining judicial resources and raising the possibility of conflicting legal and  
2 factual findings. Plaintiffs also argue that a class action is superior to individual actions because  
3 individual employees often do not have the financial means to bring legal action on their own and  
4 may also refrain from doing so out of fear of retaliation. Finally, Plaintiffs argue that the possibility  
5 that there will need to be individualized inquiries regarding damages does not render the classes  
6 unmanageable because the action can be bifurcated into a liability phases and a damages phase.

## 7                   2.       Defendant's Opposition

8           RGIS counters that *none* of the requirements of Rule 23(a) is met and further, that neither the  
9 requirements of subsection (b)(2) nor (b)(3) is met. With respect to Rule 23(a)(1), Defendant argues  
10 that the numerosity requirement is not met because joinder of the class members is not  
11 impracticable. In support of this position, Defendant points to evidence that only 26,210 individuals  
12 out of a total of 291,000 potential class members have expressed interest in joining the FLSA opt-in  
13 class. *See* Declaration of Heather M. Sager in Support of Defendant RGIS, LLC's Opposition to  
14 Plaintiffs' Motion for Class Certification Pursuant to F.R.C.P. Rule 23 ("Sager Rule 23 Opposition  
15 Decl."), ¶ 2. RGIS also cites to *Thiebes v. Wal-Mart Stores, Inc.*, 2002 WL 479840 (D. Or., January  
16 9, 2002), in which a district court in Oregon held that joinder under Rule 23 was not impracticable  
17 where only 425 employees out a potential 15,000 class members opted in to a class asserting similar  
18 claims under the FLSA.

19           Defendants argue further that Plaintiffs have not demonstrated the existence of common  
20 questions of law and/or fact and therefore do not meet the commonality requirement of Rule  
21 23(a)(2). With respect to the main issues as to which Plaintiffs have asserted that there is a common  
22 policy (or lack thereof) – unpaid off-the-clock work (donning and waiting time), inaccurate time and  
23 payroll records, travel time and missed meal breaks – RGIS argues that the "vast majority" of RGIS  
24 employees have been properly compensated, citing to declarations obtained by RGIS from its  
25 employees. *See* Declaration of A. Sevilla in Support of Defendant RGIS, LLC's Opposition to  
26 Plaintiffs' Motion for Class Certification ("Sevilla Rule 23 Opposition Decl.") (summarizing  
27 declarations of RGIS employees). In addition, RGIS makes the following specific arguments:  
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1. **Off-the-clock work (donning and waiting time):** RGIS argues that Plaintiffs are incorrect that it has no policy prohibiting off-the-clock work. It cites to language in the current version of the Field Policy Manual, which has been in effect since November 2005, stating that “[a]ll work time must be recorded on the time sheet” and explaining that where multiple employees are leaving the work-site in one vehicle, no employee should be clocked out until all of the employees riding in that vehicle have completed the inventory. *See* Lee Rule 23 Decl., Ex. 5 at 15, 18. RGIS also argues that other documents generated by its Human Resources Department show it has a policy against unpaid off-the-clock work. For example, one email to “division vps” explains that if they tell an auditor “to arrive in time to start work at 7:00” they can clock the auditor in at 7:00 but if they instruct the auditor to arrive at a *specific* time that is earlier than the start time, the auditor must be clocked in at that time. *See* Declaration of Cynthia Myers in Support of Defendant RGIS, LLC’s Opposition to Plaintiffs’ Motion for Class Certification (“Myers Rule 23 Opposition Decl.”), Ex. A (May 24, 2002 email). A subsequent instruction, dated October 19, 2006, states, “[n]ever instruct your employees to be at an inventory earlier than the scheduled start time. However, you are free to have a scheduled start time earlier than the inventory start time as long as the employees’ pay begins at the scheduled start time.” Myers Rule 23 Opposition Decl., Ex. A at DAV 0787; *see also* Myers Rule 23 Opposition Decl., Ex. A at WRN 2628 -2631 (908 Time Sheet for recording non-inventory hours worked); WRN 2625 (Time sheet instructions stating that where there is a long line of employees waiting to sign in at inventory start time, employees should be logged in at start-time even if they are unable to sign in until after the scheduled start time); DAV 782 (October 17, 2006 Inventory Supervisor’s Time Collection Application Checklist, stating that auditors traveling in same vehicle do not have to log out as a group because the sign-out time will be adjust to reflect the time of the last auditor in the vehicle to sign out); DAV 786 (October 19, 2006 Time Collection Application Implementation 2006, stating same); WRN 3189 (October 26, 2006 RGIS Application Guide re Time Sheets, stating that “time in” is “the time auditor began any inventory-related work as instructed by the Supervisor”); WRN 3540 (January 26, 2007 email from corporate

headquarters, instructing, “always ensure all hourly employees record and turn in 908 time”); WRN 15373-15374 (January 26, 2007 email from corporate headquarters containing time sheet guidance and reminders); WRN 3554-3555 (May 10, 2007 email from corporate headquarters with time sheet guidance); WRN 4472-4473 (June 8, 2007 email stating that supervisors and auditors who carry supplies or equipment must be paid for travel time); WRN 4064 (July 2007 New Hire Training Packet, instructing employees to arrive at scheduled start time, clock in and then put on audit and laser, sign out work sheet, obtain tags and attend pre-inventory meeting).

RGIS also cites to the deposition testimony of Vice President of Training Paul Landry that although he was unaware of any written policy instructing that auditors clock in before donning equipment, this has always been one of RGIS’ rules. *See* Declaration of J. Ko in Support of RGIS, LLC’s Opposition to Plaintiff’s Motion for Class Certification (“Ko Opposition Decl.”), Ex. 28 (Landry Depo.) at 202-203. Further, RGIS argues that the statements in the various policy documents are only vague, general statements and therefore, that any variation in compensation practices must be due to local practices rather than any one common policy.

RGIS challenges Plaintiffs’ reliance on the auditor interrogatory responses to show that off-the-clock time was not paid, citing to excerpts of two auditor depositions in which RGIS says the auditors’ testimony “changed dramatically.” *See* Rule 23 Opposition at 10; Ko Decl., Ex. 40 (Colbert Depo.) at 100-101; Ex. 42 (Johnson Depo.) at 104. As a result, RGIS argues, the Court should view the auditor interrogatory responses with skepticism.

2. **Inaccurate Time and Payroll Records:** RGIS argues that the statistical analysis of Dr. Drogin that Plaintiffs’ assert shows a pattern and practice of editing time records is a red herring because it is impossible to determine the reason for these time adjustments or even if they were improper. To determine the significance of these adjustments would require individualized inquiries as to each adjustment. Thus, RGIS argues, this evidence does not establish any common question that would be appropriate for class certification.



3. **Travel time:** With respect to RGIS' commute time policy, RGIS notes that Plaintiffs have only cited to the Auditor's Handbook and Field Policy Manual to show the existence of a uniform policy under which employees are compensated only for travel time that exceeds one hour each way. RGIS asserts that Plaintiffs have not cited to any witness testimony showing that this policy was uniformly applied to the employees in the proposed classes. In fact, RGIS argues, the experiences of the class members vary significantly because RGIS employees are not required to use company transportation and some districts do not even provide transportation to inventories. *See* Sevilla Rule 23 Opposition Decl., Ex. A. Further, RGIS argues, there is no evidence that RGIS employees are required to perform work during their commute to inventory locations and so this time does not constitute hours worked. With respect to the variations discussed above, RGIS offers the expert declaration of Daniel Slottje, who concludes that there are significant variations within the proposed class and over time with respect to whether RGIS offered transportation to inventories and whether employees used that transportation. *See* Expert Report of Daniel J. Slottje ("Slottje Expert Report") [docket no. 458].

RGIS further challenges Plaintiffs' assertion that the assumption of a one-hour commute time can never be reasonable, citing cases and anecdotal evidence that a one-hour commute can be reasonable. In particular, RGIS asserts that two courts have approved of its one-hour commute policy, citing the courts' summary judgment orders in *Johnson v. RGIS*, Case No. 05-0389 (E.D. Tx., May 29, 2007) and *Worley v. RGIS*, Case No. 137454 (Butte County Super. Ct., Aug. 2, 2007).<sup>13</sup>

4. **Missed or Shorted Meal Breaks:** RGIS argues that Plaintiffs have failed to meet their burden of showing a uniform policy as to meal breaks for two reasons. First, RGIS argues, Plaintiffs have assumed that employers are required to ensure that meal breaks are taken when in fact, the law requires only that employers *offer* their employees meal breaks.

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<sup>13</sup>RGIS requests that the Court take judicial notice of these orders. *See* Request for Judicial Notice in Support of Opposition to Motion for Class Certification Pursuant to FRCP Rule 23 [docket no. 459]. The request, which Plaintiffs have not opposed, is granted.

1 Second, RGIS asserts that the statistical evidence showing missed and/or short meal breaks is  
2 insufficient to establish a common policy because these statistics don't explain the reason for  
3 the missed or short meal breaks. In support of its assertion that such evidence does not  
4 provide a sufficient basis for class certification, Defendant relies on *Brinker Restaurant*  
5 *Corp. v. Superior Court*, 80 Cal. Rptr. 3d 781 (Ct. App. 4<sup>th</sup> Dist. July 22, 2008). Third, RGIS  
6 challenges Dr. Drogin's statistical analysis regarding missed breaks, arguing that Dr. Drogin  
7 improperly included unpaid commute time for the purposes of determining when a break was  
8 due (and thus, whether a break was late).

9 Defendants assert that the typicality requirement is not met because the claims of the class  
10 members will turn on individualized determinations, particularly with respect to the defenses in this  
11 case. For example, RGIS asserts that it will be entitled to raise individualized defenses  
12 demonstrating: 1) use of meet-sites was voluntary; 2) there was no waiting time associated with use  
13 of each meet site; 3) any unpaid donning time was *de minimis*; 4) hourly employees failed to take  
14 advantage of RGIS' system for reporting time; 5) each of the employees' claims are barred by the  
15 Portal to Portal Act, 29 U.S.C. § 254 to the extent they are based on activities that were preliminary  
16 or post-liminary to the employees' to their principal activities; 6) there were variances in travel pay  
17 policies over time and as applied by each supervisor; 7) time spent traveling to and from a meet site  
18 to an inventory was appropriately compensated; 8) the individual employees' claims are barred by  
19 statute of limitations or technical defaults; 9) each of the RGIS managers and supervisors acted in  
20 good faith and liquidated damages are not appropriate; 10) if there were violations due to mistakes  
21 by individuals running the inventories, there was no consistency or company knowledge or  
22 ratification of these mistakes.

23 Defendants further point out that the named plaintiffs for each of the Rule 23 States have  
24 not held each of the four positions encompassed by the classes, that is, Auditors, Assistant Team  
25 Leaders, Team Leaders and Associate area managers. RGIS cites to evidence that these positions  
26  
27  
28

1 differ as to duties and supervisory responsibility arguing that as a result, the typicality requirement is  
2 not met. *See* Opposition at 3, 36.<sup>14</sup>

3 Defendant argues that Plaintiffs do not adequately represent the interests of the classes  
4 because Plaintiffs' counsel do not have the experience necessary to handle a class action of this  
5 magnitude and further, one of the firms that seeks appointment as class counsel – Bailey Pinney PC  
6 – was disqualified by this court in another wage and hour action based on unethical conduct in that  
7 action. *See Moreno v. Autozone, Inc.*, Case No. 05-4432 CRB (N.D. Cal., Dec. 6, 2007), docket no.  
8 212. Defendant also argues that Plaintiffs do not adequately represent the proposed classes under  
9 Rule 23 because they have an inherent conflict of interest arising from their simultaneous  
10 participation in the FLSA class action.

11 With respect to Rule 23(b)(2), allowing a class action to be maintained based on the  
12 possibility that injunctive relief may be appropriate, Defendant argues that it does not apply – at  
13 least as to the Illinois, Oregon and Washington plaintiffs – because the named plaintiffs of those  
14 states are no longer RGIS employees and therefore do not have standing to seek injunctive relief.  
15 Even if they did, Defendant asserts, subsection (b)(2) does not apply because the primary relief  
16 sought by Plaintiffs is monetary damages. Defendant argues that Plaintiffs also don't satisfy the

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18 <sup>14</sup>In support of its position, RGIS cites to deposition testimony by “Myers,” “Brown,”  
19 “Davidson,” and “Manos” and to a declaration of “Appuzo.” The deposition testimony was purportedly  
20 attached to the Ko Rule 23 Opposition Declaration. The Court found only the Manos deposition excerpt  
21 attached to the Ko declaration (Exhibit 5). Manos testified that she was hired as an auditor and that her  
22 job was to “go into stores and count merchandise.” Ko Rule 23 Opposition Decl., Ex. 5 at 41. Although  
23 there also is an excerpt from the September 27, 2007 Myers deposition attached to the Ko declaration  
as Exhibit 29, the cited page does not address the job descriptions of the various positions. Rather,  
Myers addressed that question at her March 14, 2006 deposition, an excerpt of which was provided by  
Plaintiffs as an attachment to the Lee Declaration at Exhibit 24. Cynthia Myers testified in that  
deposition as follows:

24 A district manager is responsible for the district office. And that district manager has area  
25 managers that report to him or her. And the number depends on the territory that they're  
26 assigned. They may have – and this varies by district. They may have associate area managers  
that report to the district manager. They have team leaders that report to the area managers.  
And then we have our auditors, which is our hourly inventory taker position, that reports up  
through the area managers, as well as up to the district manager.

27 Lee Decl., Ex. 24 (Myers 3/14/ 2006 Depo) at 38. The Court was unable to find the Brown and  
28 Davidson deposition excerpts, which were not attached to the Ko Declaration. Nor was it able to locate  
the Appuzo declaration, for which RGIS provided no citation.

requirement of subsection (b)(3), that common questions predominate, for the same reasons discussed above with regard to Rule 23(a).

### 3. Plaintiffs' Reply

In their Reply, Plaintiffs make the following arguments:

1. **Applicable legal standard re assessment of evidence under Rule 23:** Plaintiffs assert that RGIS overstates the showing that is required to establish that certification under Rule 23 is appropriate. Whereas RGIS asserts that it is appropriate for the court to inquire into the merits of the case, Plaintiffs argue that under Ninth Circuit case law, the court is not to weigh evidence to assess the merits. Rather, the Court need only have enough information to "form a reasonable judgment on each requirement" and must accept as true the substantive allegations of the representative plaintiffs' claims. *See In re Live Concert Antitrust Litigation*, 247 F.R.D. 98, 115 (C.D.Cal. 2007) (reviewing Ninth Circuit case law regarding the question of whether courts may conduct merits assessment on Rule 23 motion).
2. **Numerosity:** Plaintiffs reject RGIS' assertion that joinder is practicable because less than 10% of the potential class members opted in to the FLSA class. Plaintiffs offer a declaration by David Borgen, an attorney with experience in wage and hour litigation, in which Borgen states that the opt-in rate for most FLSA collective actions is between 5% and 20%. *See Declaration of David Borgen in Support of Plaintiffs' Motion for Class Certification* ("Borgen Decl.") [docket no. 489], ¶ 21.<sup>15</sup>
3. **Common Issues:** Plaintiffs argue that RGIS has mischaracterized the standard, which does not require that issues be uniform; nor is it required that there must be a specific written policy in order to establish a pattern and practice of wage violations. Rather, Plaintiffs argue, class certification may be justified not only where an explicit policy is challenged but also where an employer has failed to act. Further, even the question of *whether* RGIS has a

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<sup>15</sup>Although Plaintiffs state in their Reply that the rate is between 5% and 30%, the Borgen Declaration states that the rate is between 5 and 20 %. The Court assumes that the 30% figure used in the brief is a typographical error. As discussed below, RGIS asks the Court to strike the Borgen Declaration, asserting that it should have been filed with the original motion and that it contains impermissible legal conclusions.

1 policy of not paying donning and waiting time is a common issue. *See Otsuka v. Polo Ralph*  
 2 *Lauren Corp.*, 2008 WL 3285765, \* 7 (N.D. Cal. July 8, 2008).

3 Here, Plaintiffs assert, RGIS has failed to address a uniform policy that is reflected in  
 4 materials issued by corporate headquarters. In particular, RGIS policy and training materials  
 5 require auditors to arrive ready to start counting, ie., with their equipment on, but also state  
 6 that the start-time is the inventory start time. Read together, Plaintiff's assert, these materials  
 7 indicate RGIS has a uniform policy of not paying pre-inventory donning time or waiting  
 8 time. Plaintiffs cite to the expert report of Dr. Martell in which Dr. Martell concludes that  
 9 these omissions invited unpaid donning and waiting time. In addition, Plaintiffs cite to a  
 10 supplemental report by Dr. Martell submitted with the Reply, in which Dr. Martell concludes  
 11 that the various emails and reminders cited by RGIS in its Opposition are consistent with the  
 12 conclusion of his earlier report that RGIS' policies are deficient with respect to ensuring that  
 13 waiting and donning time are paid. *See* Reply Declaration and Supplemental Report of  
 14 Richard Martell, Ph.D [docket no. 488] ("Martell Supp. Report").

15 4. **Pattern and practice violations based on representative testimony:** Plaintiffs assert that  
 16 RGIS fails to acknowledge the extensive case law that allows a class to establish a pattern  
 17 and practice of wage and hour violations based on representative testimony of class  
 18 members. Where, as here, the testimony of numerous class members supports an inference  
 19 that the employer has engaged in unlawful conduct, this is a proper basis for class  
 20 certification.

21 5. **Statistical evidence that RGIS failed to pay its employees for all hours and overtime**  
 22 **worked:** Plaintiffs submit new statistical evidence, in the form of a reply declaration by Dr.  
 23 Drogin, *see* Reply Declaration of Richard Drogin, Ph.D in Support of Plaintiffs' Motion for  
 24 Class Certification [docket no. 486] ("Drogin Reply Decl."), which they argue shows that  
 25 there is a significant discrepancy between the hours worked by putative class members in the  
 26 Rule 23 States, as reported in RGIS' time records, and the amount paid for those hours, as  
 27 reported in RGIS payroll records. This evidence, Plaintiffs assert, supports their claim that  
 28 there is a pattern and practice of payroll violations by RGIS and that RGIS has failed to keep

accurate time and payroll records. Plaintiffs explain that they did not include this statistical evidence when they filed their opening brief because RGIS did not produce the pay field data until July 3, 2008, seven days before the brief was due, even though this Court ordered RGIS to produce this data by April 16, 2008.

6. **Applicable legal standard re off-the-clock work and evidence that standard was met:** Plaintiffs assert that RGIS mischaracterizes the legal standard regarding off-the-clock work when it argues that it does not require such work; rather, the relevant question is whether an employer suffers or permits such work. Under that standard, policies that merely prohibit managers from instructing employees to come to work early but allow them to passively accept off-the-clock donning and waiting time by employees, do not comply with the law. So long as RGIS knew, or with reasonable diligence should have known, that such off-the-clock work was occurring, RGIS may be liable for wage and hour violations, Plaintiffs argue.

Further, Plaintiffs assert, there is evidence that RGIS *did* know that it was occurring. Plaintiffs point to: a) a May 24, 2002 email from corporate headquarters to all RGIS vice presidents acknowledging that there had been numerous complaints by auditors and clarifying that although a manager can tell auditors to arrive in time for work, if the manager instructs employees to come at a specific time that is before the scheduled start time, auditors must be paid from that time; *see* Myers Rule 23 Opposition Decl., Ex. A; b) complaints by auditors regarding off-the-clock work, including unpaid donning and waiting time prior to inventories, *see* Appendix of Auditor Declarations [docket no. 418], Ex. 104 (Colbert Decl.), ¶ 14, Ex. 29 (Y. Knight Decl.), ¶ 18, Ex. 83 (Miles Decl.), ¶ 18, Ex. 110 (Mueller Decl.), ¶ 17, Ex. 99 (L. Williams Decl.), ¶ 11, Ex. 100 (Zielinski Decl.), ¶ 16; c) Pay Inquiry Forms submitted to RGIS management reflecting complaints about unpaid time; d) other lawsuits filed against RGIS alleging wage and hour violations. *See, e.g., Good v. RGIS*, Case No. 05-0007 (D.W. Va.) (settled April 2005), *Pearson v. RGIS*, Case No. 06-0680 (N.D. Cal.) (settled August 2006), *Cantrelle v. RGIS*, Case No. 06-1394 (E.D.Cal.) (settled July 2007), *Murphy v. RGIS*, Case No. 07-89-Orl-28JGG (M.D. Fla.) (settled August 2007),

*Scheidt/Dodge*, Nos. C03 -00067/BC 296361 (Super. Ct. Counties of Contra Costa and Los Angeles) (settled December 2004).

7. **Travel time:** Plaintiffs reject RGIS' reliance on *Worley* and *Johnson* in support of the assertion that courts have approved RGIS' commute time policy, arguing that neither of these cases involved state law claims of the sort that are at issue in this case. Plaintiffs further assert that RGIS' arguments relating to prior court rulings are improper merits arguments that should not be considered on a Rule 23 motion.

With respect to RGIS' contention that the travel time claims require too many individualized inquiries, Plaintiffs assert that average commute times can be used to address these claims. In support of this contention, Plaintiffs submit a second declaration by Marc Bendick and a declaration by Eric Seamon, who is a certified Geographic Information Systems Professional. *See* Second Declaration of Marc Bendick ("Second Bendick Decl."), Declaration of Erich Seamon in Support of Plaintiffs' Motion for Class Certification ("Seamon Rule 23 Motion Decl.").<sup>16</sup> In his second declaration, Bendick states that the empirical data based on average commute times from the U.S. Census can be used to assign appropriate commute times to auditor employees at the county level. Second Bendick Decl., ¶ 7. Seamon reports the results of his own analysis of commute times in the four Rule 23 states and concludes that the mean commute time within each of the four states is less than sixty minutes. Seamon Rule 23 Motion Decl. ¶¶ 12-13.

8. **Missed meal breaks:** Plaintiffs point out that *Brinker*, on which RGIS relies in arguing that statistics showing missed meal periods do not warrant class certification, does not apply to Oregon, Washington or Illinois. Plaintiffs also assert that there is a split of authority among California courts, pointing to *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4<sup>th</sup> 949 (3d Dist. 2005). Even as to the California claims, Plaintiffs argue, whether *Brinker* should be applied in this case is a common question that applies to all class members. Similarly,

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<sup>16</sup>As discussed below, RGIS moves to strike these declarations.



Defendant's criticism of Dr. Drogin's statistical analysis raises common issues on the merits.<sup>17</sup>

9. **Employee declarations offered by RGIS:** Plaintiffs argue that the declarations of RGIS employees who say they were properly compensated do not defeat class certification because it is well established that the existence of such potential class members does not preclude certification. Plaintiffs also assert that of the 68 potential class member declarations submitted by RGIS, 42 are by current employees. These declarations, Plaintiffs argue, have little probative value because of the possibility the employees felt pressured to cooperate with RGIS management.<sup>18</sup> Finally, in a declaration submitted a day after the Reply brief was filed, attorney Nancy Park provides a "comprehensive compilation of testimony" of the individuals whose declarations were offered in support of RGIS' Opposition, responding to the specific points made in the Sevilla Declaration. *See* Declaration of Nancy Park in Support of Reply Memorandum of Points and Authorities in Support of Motion for Class Certification (Park Reply Decl.").
10. **Typicality:** Plaintiffs reject RGIS' assertion that they are required to have a class representative from each job category in each of the proposed classes, citing, *inter alia*, *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1184 (9<sup>th</sup> Cir. 2007). Rather, Plaintiffs assert, the class representatives claims need only be reasonably co-extensive with those of the absent class members. Plaintiffs argue that this requirement is met because Plaintiffs have a proposed class representative for all states and all claims. *See* Reply Memorandum of Points and Authorities in Support of Motion for Class Certification, Ex. A (Appendix 1) (chart of class representatives and claims). Alternatively, Plaintiffs suggest that state classes can be divided into subclasses consisting of: a) auditors; and b) assistant team leader and team

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<sup>17</sup>On November 10, 2008, Plaintiffs filed a notice informing the Court that the court of appeal's decision in *Brinker*, found at 165 Cal. App. 4<sup>th</sup> 25 (2008), was depublished by the California Supreme Court on October 22, 2008, when that court granted review of the decision.

<sup>18</sup>As discussed below, in a separate motion to strike [docket no. 481], Plaintiffs ask the Court to strike these declarations on the grounds that RGIS did not timely disclose the identities of these witnesses and that RGIS acted unprofessionally in obtaining the declarations.

leader positions. Plaintiffs note that if the Court were to create such subclasses, Plaintiffs would request 30 days in which to propose class representatives for the Illinois and Washington team leader subclasses.

11. **Adequate representation:** On the question of whether there is a conflict of interest where an opt-in class under the FLSA seeks to represent a Rule 23 class on similar claims, Plaintiffs assert that most district courts in this circuit have found that it does not. With respect to the qualifications of class counsel, Plaintiffs point to the extensive experience of David Borgen, whose declaration is offered in support of Plaintiffs' Reply brief, as well as that of the Schneider Wallace firm. Plaintiffs note that Bailey Pinney was recently appointed as class counsel by Judge Armstrong in *In re Wal-Mart Stores, Inc. Wage and Hour Litigation*, 2008 WL 413749 (N.D. Cal. 2008).
12. **Injunctive Relief under Rule 23(b)(2):** Plaintiffs reject RGIS' assertion that the primary relief they seek is damages rather than injunctive relief. Rather, Plaintiffs argue, remedying the deficiencies of RGIS' policies and procedures is at the heart of this litigation. Further, Plaintiffs assert, RGIS has conceded that Plaintiffs have proposed class representatives for the California class who are current employees, including Boze, Garcia, Pease, Pierson, Piper, Rosenthal and Saïtes. With respect to the Illinois class, Plaintiffs have proposed that Joan Johnson, a current RGIS employee, be added as a plaintiff and class representative. As to Oregon and Washington, Plaintiffs submit, with their Reply, the declarations of Jewel Gatlin and Michele Zustak, who are current RGIS employees and are willing to serve as class representatives. *See* Appendix of Declarations [docket no. 491], Exhs. N & S.
13. **Rule 23(b)(3) requirements:** Plaintiffs reiterate their arguments that common questions predominate and that the class mechanism is superior to requiring individual actions, which would potentially flood the courts while also precluding access for those who do not have the means to pursue an action or who fear employer retaliation. *See Ostuka v. Polo Ralph Lauren*, 2008 WL 3285765 at \* 8 (N.D. Cal. July 8, 2008).

#### 4. Defendant's Motion to Strike the Reply

1 Defendants bring a motion to strike Plaintiffs' Reply brief, arguing that Plaintiffs have  
2 improperly introduced new evidence and arguments that exceed the scope of the Reply. Defendants  
3 object, in particular, to new testimony by ten auditors and by witnesses Bendick, Seamon, Borgen  
4 and Drogin. Defendant also argues that the Reply should not be considered because Plaintiffs  
5 exceeded the page limit in the local rules. RGIS does not address the fact that at the time it filed the  
6 motion to strike, the Court had already granted Plaintiffs' administrative request to exceed the page  
7 limit set forth in the Local Rules, *see* docket no. 503.

8 Plaintiffs assert that the new evidence is permissible because it is offered in response to  
9 arguments raised in the Opposition. In addition, with respect to the Drogin supplemental report,  
10 Plaintiffs point out that they did not receive the necessary data for Dr. Drogin to complete his  
11 analysis until just before their motion was due and long after the Court had ordered this data  
12 produced.

#### 13 **5. Plaintiffs' First Motion to Strike**

14 Plaintiffs move to strike the declarations of 20 RGIS salaried manager and 29 auditor  
15 declarations under Fed. R. Civ. P. 37(c)(1) on the basis that the identities of these declarants were  
16 not timely disclosed and RGIS' conduct in obtaining the declarations was unprofessional. *See*  
17 docket no. 481 ("Plaintiffs First Motion to Strike"). Plaintiffs also seek clarification as to whether  
18 Daniel Slottje relied on any of these declarations in his expert report submitted in support of RGIS'  
19 Opposition. Plaintiffs note that Slottje states that he relied on declarations in preparing his report.  
20 *Id.*; *see also* Slottje Expert Report at 4. If Slottje relied on any of the challenged declarations,  
21 Plaintiffs ask that any portion of the report that is affected be stricken. Plaintiffs also ask that the  
22 court send corrective notices to the individuals RGIS contacted for declarations, citing statements by  
23 those declarants Plaintiffs were able to reach that Plaintiffs assert show improper conduct on the part  
24 of RGIS.

#### 25 **6. Defendant's Surreply**

26 With the Court's leave, *see* docket no. 515, Defendant filed a sur-reply in response to  
27 Plaintiff's Reply. Defendants raise the following arguments in their sur-reply:  
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1. **Applicable legal standard re assessment of evidence under Rule 23:** RGIS argues that Plaintiffs' reliance on *In re Live Concert Antitrust Litigation*, 247 F.R.D. 98 (C.D.Cal. 2007) for the proposition that the Court should not assess evidence on the merits is misplaced because that case relies on an opinion that has been withdrawn, *Dukes v. Wal-Mart*, 474 F.3d 1214 (9<sup>th</sup> Cir. 2007). According to RGIS, the updated *Dukes* decision makes clear that the courts have a *duty* to assess the evidence in determining whether the requirements of Rule 23 have been met. *See Dukes*, 509 F.3d 1168 (9<sup>th</sup> Cir. 2007).
2. **New evidence:** RGIS argues that the new evidence submitted by Plaintiffs, namely, the supplemental declarations of Drs. Drogin and Martell and the new declarations by David Borgen and Erich Seamon, are unreliable and should be disregarded.<sup>19</sup> With respect to Drogin's Reply Expert Report, RGIS submits a response by its own expert, Daniel Slottje, challenging Dr. Drogin's methodology and conclusions. *See* Rebuttal Report of Daniel J. Slottje: In Response to Reply Declaration of Richard Drogin, Ph.D., filed August 28, 2008 ("Slottje First Rebuttal Report"). For example, Dr. Slottje challenges Dr. Drogin's finding that actual compensation was 9 % less than it should have been based on RGIS' payroll and time records. Slottje First Rebuttal Report, ¶¶ 6-7. Dr. Slottje states that he conducted his own analysis and found there was a shortfall of only .10%. *Id.*
3. **Use of representative testimony:** RGIS disputes Plaintiffs' assertion that representative testimony can be used at the class certification stage, especially where, as here, there is so much variation among the experiences of the class members. RGIS argues that the cases Plaintiffs cite on this question involved use of representative testimony at trial and involved a single location or only a small number of employees. *See McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 588-589 (9<sup>th</sup> Cir. 1988); *Martin v. Selker Bros.*, 949 F.2d 1286, 1298 (3d Cir. 1991); *Donovan v. Bel-Loc Diner*, 780 F.2d 1113, 1115-1116 (4<sup>th</sup> Cir.1985); *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10<sup>th</sup> Cir. 1983); *Reich v. Brenaman Elec. Serv.*, 1997 WL 164235, \*7 (E.D.Pa. March 28, 1997).

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<sup>19</sup>RGIS also files separate objections to this evidence. *See* Docket No. 540.

4. **Plaintiffs' reliance on authority related to common policy, including *Otsuka*:** RGIS argues that Plaintiffs err in relying on *Otsuka* for the proposition that RGIS' absence of a company-wide written policy on donning and waiting time constitutes a uniform policy. RGIS asserts that this case was decided before *Brinker* and notes that in a subsequent decision, Judge Illston limited the holding of *Otsuka* to the specific facts of that case in light of *Brinker*. See *Gabriella v. Wells Fargo Financial, Inc.*, 2008 WL 3200190 (N.D. Cal. August 4, 2008). RGIS further asserts that other cases that Plaintiffs cite to show a common policy are not on point. See *Frank v. Gold'n Plump Poultry, Inc.*, 2007 U.S. Dist. LEXIS 71179, 7-9 (D. Minn. Sept. 24, 2007); *Bates v. UPS*, 204 F.R.D. 440, 448 (N.D. Cal. 2001); *Jensen v. Eveleth Taconite Co.*, 139 F.R.D. 657, 666 (D. Minn. 1991); *Staley v. Wilson County*, 2006 WL 2401083, \* 7 (M.D. Tenn. Aug. 18, 2006). Rather, RGIS argues, numerous district court cases in the Ninth Circuit indicate that whether and how managers have interpreted RGIS' mandate prohibiting off-the-clock work is not a common question that supports class certification under Rule 23. See *Brown v. Federal Express Corp*, 249 F.R.D. 580 (C.D. Cal. 2008); *Cornn v. United Parcel Service, Inc.*, 2005 WL 2072091 (N.D. Cal. 2005); *White v. Starbucks*, 497 F. Supp. 2d 1080 (2007); *Kenny v. Supercuts*, 2008 WL 2265194 (N.D. Cal. June 2, 2008).
5. **Proposed addition of new plaintiffs:** RGIS objects to Plaintiffs' request to add five new plaintiffs to serve as class representatives – three in their opening brief (Molmen, Johnson and Williams) and two in their Reply brief (Gatlin and Zustak). RGIS asserts that these requests are untimely and that in the absence of adequate class representatives, Plaintiffs do not have standing to proceed on the class claims.
6. **Conflict between Rule 23 claims and FLSA claims:** RGIS argues that in addressing the potential conflict that may arise where plaintiffs seek to proceed under both Rule 23 and the FLSA, Plaintiffs fail to address cases in which the state law claims for which Rule 23 certification is sought are either numerous or novel and complex. See *Neary v. Metropolitan Property and Casualty Insurance*, 472 F. Supp. 2d 247, 253 (D. Conn. 2007); *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3d Cir. 2003); *Glewwe v. Eastman Kodak Co.*, 2006 WL

1455476 (W.D.N.Y. May 25, 2006). In those situations, RGIS argues, courts may decline Rule 23 class certification on the ground that the state law claims are likely to overwhelm the FLSA claims. RGIS argues that in this case, where Plaintiffs have asserted 26 state law claims, and where Plaintiffs themselves have acknowledged that the relevant state law on some of the claims is sparse and in some cases, unresolved, the Court should deny class certification under Rule 23.

## 7. Plaintiffs' Second Motion to Strike

After RGIS filed its sur-reply, Plaintiffs filed a motion to strike, *see* docket no. 570 ("Plaintiff's Second Motion to Strike"), requesting that the Court strike the following documents and portions of documents:

1. **Slottje First Rebuttal Report, ¶¶ 6-7:** In paragraphs 6 and 7, Dr. Slottje addressed Dr. Drogin's findings relating to an alleged shortfall in compensation. Dr. Slottje concluded that Dr. Drogin's methodology was flawed and stated that his own analysis revealed a much smaller shortfall than Dr. Drogin had found. Plaintiffs argue that these paragraphs should be stricken because RGIS failed to comply with the requirement under Fed. R. Civ. P. 26(a)(2)(B) that experts must disclose the basis for the opinion and the data on which the expert relied. Even after the Slottje First Rebuttal Report was filed, Plaintiffs assert, RGIS has refused to provide the underlying calculations and data supporting Dr. Slottje's conclusions, despite Plaintiffs' requests for them. Plaintiffs further assert that Dr. Slottje should not be permitted to testify on this subject matter at trial.
2. **Sager Opposition Declaration, ¶ 6 and Ex. V:** Paragraph 6 of the Sager Opposition Declaration and Exhibit V contain "anecdotal" evidence that a one-hour commute might be considered reasonable by some. In the Notice of Motion, Plaintiffs ask that this evidence be stricken because it is irrelevant and lacks foundation. The request to strike this evidence, however, is not addressed in the memorandum of points and authorities.
3. **Myers Opposition Declaration, Non-Bates Stamped Documents:** RGIS included numerous documents as exhibits to the Myers Opposition Declaration that did not carry Bates numbers. Plaintiffs assert that these documents were never produced to them in

discovery, thus depriving them of the opportunity to depose Ms. Myers or other 30(b)(6) witnesses as to their significance. Therefore, Plaintiffs argue, these documents should be stricken and RGIS should be precluded from introducing them at trial.

In response to Plaintiffs' Second Motion to Strike, RGIS asserts that the documents that it failed to produce were listed on its privilege logs and that although it offered in May 2008 to produce these documents if Plaintiffs agreed to a limited waiver of attorney-client privilege, Plaintiffs did not respond to that request. *See* Sager Rule 23 Opposition Decl., ¶ 4. According to RGIS, it was not until after Plaintiffs' Rule 23 Reply had been filed that Plaintiffs finally agreed to the limited waiver. *Id.*, Ex. 2. With respect to the Slottje First Rebuttal Report, RGIS argues that Dr. Slottje expressly references the same data cited by Dr. Drogin as the basis for his opinions in paragraphs 6 and 7. *See* Slottje First Rebuttal Report, ¶ 5; *see also* Rebuttal Report of Daniel J. Slottje: In Response to Reply Declaration of Richard Drogin, Ph.D., Filed November 6, 2008 ("Slottje Second Rebuttal Report"), ¶ 6 & Appendices 1 and 2 (elaborating on methodology).

#### **B. Motion to Bifurcate**

Plaintiffs bring a motion to bifurcate in which they ask that the Court to divide the trial into two stages, the first addressing questions of class liability and injunctive relief and then, if liability is found, a second stage addressing monetary damages. Plaintiffs assert that courts frequently bifurcate the damages phase in wage and hour class actions and that such an approach is warranted in this case. In particular, Plaintiffs argue that bifurcation makes sense because it is in the interest of judicial economy, the issues of liability and damages are easily separable, the parties will not suffer any prejudice from bifurcation and it will reduce the risk of jury confusion.

RGIS opposes the request to bifurcate, arguing that the questions relating to liability are closely intertwined with questions of damages. As a result, RGIS asserts, a great deal of evidence is relevant to both liability and damages. If as a result of bifurcation RGIS were limited to presenting such evidence in either the liability or the damages phase, RGIS argues, it would be severely prejudiced.

#### **C. Motion to Decertify**



1 In the Motion to Decertify, RGIS repeats many of the arguments raised in opposition to  
2 Plaintiffs' Rule 23 Motion and relies on much of the same evidence. RGIS also provides a summary  
3 of declarations and deposition testimony – including both previously submitted and new testimony –  
4 by RGIS employees whose experiences, they assert, show that the experiences of the opt-in  
5 plaintiffs are anomalous. *See* Declaration of A. Sevilla in Support of Defendant RGIS, LLC's  
6 Motion to Decertify Class [docket no. 566] ("Sevilla Decertification Motion Decl.") (summarizing  
7 testimony found in docket nos. 121, 455, 457, 565 and 568). RGIS argues that because there is no  
8 uniform policy as to donning and waiting time or travel time, and because individualized inquiries  
9 predominate as to Plaintiffs' claims, the FLSA classes should be decertified.

10 Plaintiffs counter that their claims are based on uniform policies and that common issues of  
11 law and fact justify class status, citing evidence discussed above in connection with Plaintiffs' Rule  
12 23 Motion. In support of their opposition, Plaintiffs filed another report by their expert, Richard  
13 Drogin, addressing his findings as to both the state law claims and the FLSA claims, as well as  
14 responding to Dr. Slottje's August 7, 2008 report, filed in support of RGIS' Decertification Motion.  
15 *See* Declaration of Richard Drogin PhD in Opposition to Defendant's Motion for Decertification  
16 [docket no. 607] ("Drogin Decertification Opposition Decl."). Plaintiffs also filed a supplemental  
17 declaration by David Borgen expanding on his prior declaration addressing opt-in rates in FLSA  
18 actions and asserting that the opt-in rate here indicates that decertification of the FLSA class would  
19 be improper. *See* Supplemental Declaration of David Borgen in Opposition to Motion to Decertify  
20 Collective Action [Docket No. 606] ("Borgen Supp. Decl.").

21 RGIS objects to both the Drogin Decertification Opposition Declaration and the Borgen  
22 Supplemental Declaration as untimely and further object to the Borgen Supplemental Declaration on  
23 the basis that it contains legal conclusions and therefore constitutes improper opinion evidence. *See*  
24 Defendant RGIS, LLC's Objections to Evidence Submitted in Support of Plaintiffs' Opposition to  
25 RGIS' Motion to Decertify Class Action [Docket No. 633].

26 **D. Plaintiffs' Third Motion to Strike**

27 Plaintiffs bring a motion to strike the declarations of 7 RGIS salaried manager and 20  
28 auditors that RGIS relied upon in its Decertification Motion under Fed. R. Civ. P. 37(c)(1) on the

basis that the identities of these declarants were not timely disclosed and RGIS' conduct in obtaining the declarations was unprofessional. *See* Docket No. 614 ("Plaintiffs' Third Motion to Strike"). RGIS opposes the motion on the ground that it did not act improperly, either with respect to the timing of the disclosure or as to its communications with potential class members.

#### **E. Plaintiffs' Fourth Motion to Strike**

Plaintiffs bring a motion to strike the declarations of 90 RGIS salaried managers who submitted declarations in support of Defendants Reply on its Motion to Decertify, *see* Docket No. 664 ("Plaintiffs' Fourth Motion to Strike"), on the basis that the identities of the declarants were never previously disclosed to Plaintiffs. Plaintiffs further request that the Declaration of Susan Burr, docket no. 629, be excluded on the basis that it contains legal argument and lacks foundation.

Defendant opposes the Fourth Motion to Strike on the ground that the declarations were offered as impeachment evidence in response to Plaintiffs' evidence. With respect to the Burr Declaration, Defendant asserts that it was proper because it was filed to rebut the declarations of Nancy Parks and Andrew Lee.

#### **F. Motion to Dismiss Invalid Opt-In Plaintiffs**

Defendants bring a Motion to Dismiss Invalid Opt-In Plaintiffs ("Motion to Dismiss") asking that the Court dismiss the following categories of Plaintiffs who have filed opt-in consents:

- **Opt-In Plaintiffs who have expressly withdrawn their consent:** RGIS has filed a list of 29 opt-in plaintiffs who have withdrawn their consent. *See* Motion to Dismiss, Ex. B.
- **Opt-In Plaintiffs whose consent forms were post-marked after the 90-day notice period:** RGIS has filed a list of 491 opt-in plaintiffs whose consent forms were postmarked after the 90-day consent period. *See* Motion to Dismiss, Ex. A.
- **Opt-In Plaintiffs who have not responded to discovery requests even after the Court issued an Order to Show Cause instructing them to comply and explaining that they would be dismissed from the action if they failed to do so.** RGIS has filed a list of 99 opt-in plaintiffs who did not respond to discovery and did not comply with the Court's subsequent Order to Show Cause. *See* Motion to Dismiss, Ex. C.

- 1 • **Opt-In Plaintiffs who did not work for RGIS during the statutory period:** RGIS  
2 identifies four specific opt-in Plaintiffs who apparently did not work for RGIS during the  
3 statutory period and asks that the Court rule, on the basis of this evidence, that employees  
4 who did not work for RGIS during the statutory period should be dismissed. If the Court  
5 issues such a ruling, RGIS says, it will engage in a review of the employment histories of the  
6 opt-in plaintiffs to determine which ones should be dismissed on this basis.
- 7 • **Opt-In Plaintiffs who did not hold any of the positions that are at issue in this case:**  
8 RGIS does not identify any specific opt-in plaintiffs who fall into this category, but it says  
9 that if the Court rules that such opt-in Plaintiffs should be dismissed, it will review the  
10 employment histories of the opt-in plaintiffs to determine if any fall into this category.
- 11 • **Opt-In Plaintiffs who filed Plaintiff's consent form rather than the form sent out**  
12 **by the third party administrator, RG/2.** RGIS notes that some of the opt-in  
13 plaintiffs have submitted the consent form that was used by plaintiffs' counsel before  
14 the Court-approved notice was adopted and have not submitted the court-approved  
15 form. RGIS suggest Plaintiffs' counsel have acted improperly and that these opt-in  
16 plaintiffs should be dismissed.

17 In their Opposition, Plaintiffs assert that the Motion to Dismiss is both unnecessary and  
18 premature. In particular, Plaintiffs state that they do not oppose dismissal of the opt-in plaintiffs  
19 who have withdrawn their consent and therefore, that this issue could have been resolved by way of  
20 a stipulated order. With respect to the request that the Court dismiss opt-in plaintiffs who did not  
21 work at RGIS during the relevant period or held positions that do not fall within the class, Plaintiffs  
22 assert that RGIS is essentially requesting an advisory opinion because it has failed to identify (and  
23 does not yet know) the specific plaintiffs whose dismissal it seeks.

24 With respect to the opt-in plaintiffs whose consent was post-marked after the 90 day period,  
25 Plaintiffs assert they should not be dismissed because allowing them to participate will not give rise  
26 to any prejudice to RGIS and will contribute to judicial economy to the extent these plaintiffs might  
27 bring separate actions if they are dismissed from this action. As to the opt-in plaintiffs who have not  
28

1 responded to discovery, Plaintiffs assert that dismissal is too extreme, especially as it is unclear  
2 whether these individuals even received the Court's order to show cause.

3 Finally, Plaintiffs deny RGIS' allegation that they have tried to circumvent the Court  
4 authorized notice process. They state that they have never sent out their own notices but that in  
5 response to requests for information from potential plaintiffs they did send out a copy of the court-  
6 authorized notice along with the consent-form they had used prior to creation of the court-authorized  
7 consent form. Plaintiffs counsel explain that they believed that they were not permitted to send out  
8 the official consent forms used by RG/2, which carried bar codes, and further, that in denying RGIS'  
9 previous motion to declare opt-ins invalid, the Court had found the consent forms used by Plaintiffs'  
10 counsel to be adequate.

#### 11 **IV. ANALYSIS**

##### 12 **A. The Motions to Strike<sup>20</sup>**

##### 13 **1. Legal Standard**

14 Under Fed. R. Civ. P. 12(f), "the court may order stricken from any pleading any insufficient  
15 defense or any redundant, immaterial, impertinent, or scandalous matter." However, motions to  
16 strike under Rule 12 are generally disfavored. *Chiron Corp. v. Abbott Labs.*, 156 F.R.D. 219, 220  
17 (N.D. Cal. 1994). In addition, Rule 37 of the Federal Rules of Civil Procedure allows the Court to  
18 strike a pleading, or issue other "just orders" as a sanction for violating the court's discovery order.

##### 19 **2. Defendant's Motion to Strike**

20 RGIS asks the Court to strike Plaintiffs' Rule 23 Reply brief, as well as declarations, or parts  
21 of declarations, cited in support of the Reply. The motion is DENIED.

22 First, parties are permitted to file declarations in support of Reply briefs under the Local  
23 Rules. *See* Civ. L.R. 7-3(c). Further, the district court has discretion to consider legal issues that are  
24 raised for the first time on reply and may also consider new evidence, so long as the opposing party  
25 is given an opportunity to respond. *See Glen K. Jackson, Inc. v. Roe*, 273 F.3d 1192, 1202 (9<sup>th</sup> Cir.  
26 2001) (district court has discretion to consider issue raised in reply brief); *Provenz v. Miller*, 102

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27  
28 <sup>20</sup>The parties have raised a myriad of evidentiary objections. The Court rules on those objections  
only to the extent that it relies on the evidence that is challenged.

1 F.3d 1478, 1483 (9<sup>th</sup> Cir. 1996) (where new evidence is introduced on reply, it should not be  
2 considered unless opposing party has a chance to respond). Here, the new declarations, as well as  
3 the arguments raised in the Reply, were largely within the scope of the issues raised by RGIS'  
4 opposition. To the extent Plaintiffs may have gone beyond the scope of the Opposition, RGIS was  
5 given an opportunity to submit a sur-reply, as well as additional rebuttal declarations of its own.  
6 Under these circumstances, it would be inappropriate to grant the relief requested by RGIS.

7 The Court also notes that to the extent the Drogin reply declaration contains material that  
8 would ordinarily have been expected to have been filed in support of the motion, Plaintiffs have  
9 explained their late submission on the basis of the late production of the pay fields to Plaintiffs.  
10 Whoever may or may not be at fault for this, RGIS does not dispute that this data was not provided  
11 to Plaintiffs until July 3, 2008, just eight days before their Rule 23 motion was due to be filed. Under  
12 these circumstances, the Court declines to strike the new material offered by Dr. Drogin in his reply  
13 declaration.

### 14 3. Plaintiffs' Second Motion to Strike

15 Plaintiffs bring a motion to strike paragraphs 6 and 7 of the Slottje First Rebuttal Report, [a  
16 portion of the Sager Opposition Declaration], as well as a related exhibit, and various documents  
17 that RGIS filed in support of its sur-reply on the Rule 23 Motion. The motion is DENIED.

18 First, Slottje's First Rebuttal Report is in response to the Drogin reply declaration and the  
19 analysis that Plaintiffs challenge is based on the same data used by Drogin, that is, the two tables  
20 produced to Plaintiffs on July 3, 2008. *See* Slottje First Rebuttal Report, ¶ 5. Slottje also lists the  
21 assumptions he used in coming to his conclusions. While it is true that Slottje does not provide a  
22 detailed explanation of his methodology, Plaintiffs have offered no authority suggesting that the  
23 report is so deficient as to fall below the requirements of Rule 26.

24 Second, the Court does not find that the late production of the documents attached to the  
25 Meyers Declaration have resulted in any meaningful prejudice to Plaintiffs. Therefore, their  
26 exclusion is not warranted under Rule 37.

### 27 4. Plaintiffs' First, Third and Fourth Motions to Strike

28

In its First, Third and Fourth Motions to Strike, Plaintiffs ask the Court to exclude certain salaried manager and auditor declarations on the grounds that: 1) RGIS allegedly concealed their identity; and 2) Defendant has engaged in misleading practices in obtaining the declarations. Because the Court does not rely on any of these declarations in determining the Rule 23 Motion or the Decertification Motion, the Court declines to rule on the merits of these motions, which are DENIED without prejudice.

## **B. The Rule 23 Motion for Class Certification**

### **1. Legal Standard**

A party seeking to certify a class must satisfy the four requirements set forth in Rule 23(a) and at least one of the requirements of Rule 23(b).<sup>21</sup> Before certifying a class, the court “must

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<sup>21</sup>Rule 23 provides, in relevant part, as follows:

(a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

1 conduct a ‘rigorous analysis’ into whether the prerequisites of Rule 23 are met.” *Valentino v.*  
 2 *Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9<sup>th</sup> Cir. 1996) (citing *In re American Medical Systems,*  
 3 *Inc.*, 75 F.3d 1069, 1078-79 (6<sup>th</sup> Cir. 1996)).

4 While it is inappropriate for the court to consider the merits of the claims in determining  
 5 whether class certification is appropriate, the court “does require sufficient information to form a  
 6 reasonable judgment” that the requirements of Rule 23 are met. *Blackie v. Barrack*, 524 F.2d 891,  
 7 901 n.17 (9<sup>th</sup> Cir. 1975). Therefore, “the Court is at liberty to consider evidence which goes to the  
 8 requirements of Rule 23 even though the evidence may also relate to the underlying merits of the  
 9 case.” *In re Unioil Securities Litigation*, 107 F.R.D. 615, 618 (C.D. Cal. 1985) (cited with approval  
 10 in *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9<sup>th</sup> Cir. 1992)); *see also Dukes v. Wal-Mart,*  
 11 *Inc.*, 509 F.3d 1168, 1177 n.2 (9<sup>th</sup> Cir. 2007)(noting that “courts are not only ‘at liberty to’ but must  
 12 ‘consider evidence which goes to the requirements of Rule 23 [at the class certification stage] even  
 13 [if] the evidence may also relate to the underlying merits of the case’” and holding that district court  
 14 acted properly in conducting “a ‘rigorous analysis’ of the conflicting evidence’” to determine  
 15 whether the commonality prerequisite was satisfied).

## 16 2. Numerosity

17 Plaintiffs assert that each of the proposed classes satisfies the numerosity requirement,  
 18 pointing to evidence that there are at least 1,500 potential plaintiffs as to each of the Rule 23 classes.  
 19 *See* Drogin Decl., Docket No. 406, ¶ 4 (stating that there are inventory shifts for 17,167 RGIS  
 20 employees in California, 10,123 RGIS employees in Illinois, 1,548 employees in Oregon and 3,033  
 21 employees in Washington during the relevant class periods). RGIS does not challenge Plaintiffs’  
 22 evidence relating the number of potential plaintiffs. Rather, it asserts that joinder would not be  
 23 “impracticable,” citing to evidence that out of a total of 291,000 potential class members, only  
 24

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25 (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;  
 26 and

27 (D) the likely difficulties in managing a class action.

28 Fed. R. Civ. P. 23(a) and (b).



26,210 individuals have expressed interest in joining the FLSA opt-in class. *See* Sager Rule 23 Opposition Decl., ¶ 2. RGIS notes that in *Thiebes v. Wal-Mart Stores, Inc.*, 2002 WL 479840 (D. Or., January 9, 2002), a district court in Oregon held that joinder under Rule 23 was not impracticable where only 2.7% of the potential class members opted in to the FLSA class asserting similar claims. The Court finds that the numerosity requirement is met with respect to the proposed Rule 23 classes.

Rule 23(a)(1) requires that the size of the proposed class be so numerous that joinder of all the class members is impracticable. There is no set number cut-off. *See Welling v. Allexy*, 155 F.R.D. 654, 656 (N.D. Cal. 1994) (noting that courts have certified classes as small as 14 and have often certified classes with 50-60 members). Here, the number of potential plaintiffs in each of the Rule 23 States is at least 1,548 (Oregon) and as high as 17,167 (California). Further, even if the Court assumes that only approximately 10% of those potential plaintiffs would be likely to assert individual claims (that is, the percentage of RGIS employees who have opted in to the FLSA class action), the minimum number of individuals whose joinder would be at issue would be 150 (for Oregon). At the other end of the spectrum, the claims of at least 1,700 individuals would have to be joined if the California class were not certified. Whichever numbers are used, the Court concludes that they are sufficiently large to make joinder impracticable.

The district court's decision in *Thiebes* does not stand for a contrary result. While it was within the discretion of the district court under the specific facts of that case to conclude that it was not impracticable to join 425 plaintiffs in a single action, nothing in that case requires such a result here.<sup>22</sup>

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<sup>22</sup>The court in *Thiebes* relied on the opt-in rate on the FLSA claims only to support its conclusion that the numerosity requirement was not met because joinder was not impracticable. Other cases have cited to low opt-in rates in support of the conclusion that there is no uniform policy or practice of violating wage and hour laws. *See, e.g., Smith v. T-Mobile USA, Inc.*, 2007 WL 2385131 \*6 (C.D. Cal. Aug. 15, 2007). This Court agrees with the district court in *Falcon v. Starbucks Corp.*, 2008 WL 155313 \*7 (S.D. Tex. Jan. 15, 2008) that the probative value of the opt-in rate with respect to the question of whether a defendant has a uniform policy or practice is low because the decision of whether or not to opt in to an FLSA class involves a wide variety of factors. Accordingly, the Court does not rely on the FLSA opt-in rate in assessing whether RGIS has uniform policies that justify certification under Rule 23.

1 The Court finds that the numerosity requirement is met as to all of the proposed Rule 23  
2 classes.

### 3 3. Commonality and Predominance

4 Rule 23(a)(2) requires Plaintiffs to demonstrate the existence of questions of law and fact  
5 that are common to the class. Fed. R. Civ. P. 23(a)(2). Further, subsection (b)(3) of Rule 23  
6 requires Plaintiffs to demonstrate that these common questions predominate over questions that  
7 affect only individual plaintiffs. The Ninth Circuit has explained that the commonality requirement  
8 of subsection (a)(2) is construed permissively. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th  
9 Cir. 1998). Under subsection (a)(2), “[t]he existence of shared legal issues with divergent factual  
10 predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies  
11 within the class.” *Id.* The predominance test of Rule 23(b)(3) is “far more demanding” than the  
12 commonality test under Rule 23(a)(1). *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997).  
13 “To qualify for certification under [subsection (b)(3)], a class must satisfy two conditions in addition  
14 to the Rule 23(a) prerequisites: common questions must ‘predominate over any questions affecting  
15 only individual members,’ and class resolution must be ‘superior to other available methods for the  
16 fair and efficient adjudication of the controversy.’” *Hanlon v. Chrysler Corp.*, 150 F.3d at 1022.

17 “When the claim is that an employer’s policy and practices violated labor law, the key  
18 question for class certification is whether there is a consistent employer practice that could be a basis  
19 for consistent liability.” *Kamar v. Radio Shack Corp.*, 2008 WL 4552953 \*10 (C.D. Cal. October 8,  
20 2008). Thus, where the employer has a uniform policy that is uniformly applied, the  
21 appropriateness of class certification is “easily established.” *Id.* In cases where there are both  
22 individualized inquiries and common questions, courts are more willing to certify classes where the  
23 individualized inquiries relate to damages than where they relate to liability. *Kurihara v. Best*  
24 *BuyCo., Inc.*, 2007 WL 2501698 \* 9 (N.D.Cal. Aug. 30, 2007). However, the “mere existence of  
25 individualized liability issues is not sufficient to warrant denial of class certification.” *Id.* On the  
26 other hand, where there is no common policy or practice on the part of the employer, class  
27 certification is unavailable. *See, e.g., Cornn v. United Parcel Service, Inc.*, 2005 WL 2072091  
28 (August 26, 2005).

Here, Plaintiffs assert that there are common questions of law and fact that satisfy both subsections (a)(2) and (b)(3) of Rule 23 based on RGIS' policies and practices relating to: 1) donning and waiting time; 2) travel time; and 3) meal breaks. In addition, Plaintiffs cite to payroll records they assert shows that RGIS has a practice of failing to pay employees all wages earned.

**a. Donning and Waiting Time**

Plaintiffs argue that the state laws of all four Rule 23 States require employers to pay for work that an employer "suffers or permits" and that with respect to donning and waiting time, RGIS has not adopted a policy prohibiting such work. Instead, Plaintiffs assert, the various policy handbooks and guidelines issued by corporate headquarters, which all RGIS employees are bound to follow, fail to require that donning and waiting time be paid and even implicitly suggest that auditors are not to be paid for time spent preparing for inventories prior to the inventory start time. This lack of an adequate policy, Plaintiffs assert, has given rise to a widespread practice of failing to pay auditors for donning and waiting time, as evidenced by auditor and manager declarations and the expert report of Dr. Martell. At oral argument, Plaintiffs clarified that the waiting time referred to in their motions is only waiting time that is associated with donning equipment and does not include any waiting time by employees *prior* to their receipt of equipment, such as waiting in line to be given the equipment before an inventory.<sup>23</sup>

RGIS argues that there is no common policy or practice that gives rise to common questions as to donning and waiting time. Rather, it asserts that RGIS has a policy of fully compensating all work, including donning and waiting time. In support of its position, RGIS points to various documents issued by corporate headquarters, auditor and manager declarations of its own and the testimony of the vice president of training, Paul Landry. While a close call, the Court concludes that Plaintiffs have established that there are common questions relating to donning and waiting time that satisfy both subsections (a)(2) and (b)(3).

As a preliminary matter, the Court notes that the parties have waged an all-out evidentiary war in connection with the Rule 23 Motion and the related Decertification Motion, with each side

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<sup>23</sup>Hereinafter, the Court's references to "waiting and donning time" should be construed as incorporating the limitations set forth by Plaintiffs.

1 filing literally hundreds of declarations and, in turn, objecting to or moving to strike the bulk of the  
2 opposing parties' evidence. Much of the evidence that has been filed goes more to the merits of  
3 Plaintiffs' claims than it does to the Rule 23 inquiry, though there is admittedly a significant degree  
4 of overlap. It is not the role of the Court to make findings on the merits. Nor has the Court  
5 attempted to address each of the hundreds of evidentiary objections that have been raised. Rather,  
6 the Court rules only on those objections that relate to evidence it relies upon in support of its  
7 decision.

8       On the question of whether there is a uniform policy or practice, Plaintiffs' have presented  
9 evidence from which a finder of fact could conclude that RGIS' compensation policies are dictated  
10 by corporate headquarters and that as a result of these policies, class members are not compensated  
11 for donning and waiting time. In particular, the Auditors's Handbook expressly requires auditors to  
12 be "ready to start work" at the inventory start time but instructs auditors that their "time in" for time  
13 sheet purposes is the inventory start time. Lee Rule 23 Decl., Ex. 2 at 16, 18. Similarly, an RGIS  
14 training manual, under the heading "Policies and Procedures," instructs that auditors should "[a]rrive  
15 at the inventory in time to be prepared to start counting at the designated start time." *Id.*, Ex. 6.  
16 Although it is not expressly stated in these policy directives, RGIS' 30(b)(6) witness, Cynthia Myers  
17 testified that auditors are expected to have donned their equipment by the inventory start time. Lee  
18 Rule 23 Decl., Ex. 26 (9/07 Meyers Depo.) at 66. Further, it is undisputed that prior to the issuance  
19 of the July 2007 New Hire Training Packet, *see* Myers Rule 23 Opposition Decl., Ex. A at WRN  
20 4064, there was no *written* policy expressly requiring that auditors be paid for their pre-inventory  
21 donning and waiting time.

22       Although the documents cited by RGIS to show that its policy was not defective suggest that  
23 its policy is to pay for donning and waiting time, these materials only highlight the fact that there is  
24 a common issue: is it company policy to pay for donning and waiting. Some even appear to support  
25 Plaintiffs' position. *See, e.g.,* Myers Rule 23 Opposition Decl., Ex. A at WRN 15439 (May 24, 2002  
26 email stating that managers can tell an auditor "to arrive in time to start work at 7:00" and clock  
27 them in at 7:00 but if they instruct the auditor to arrive at a *specific* time that is earlier than the start  
28 time, the auditor must be clocked in at that time). In sum, there is sufficient evidence to conclude

1 that there are common questions relating donning and waiting time that arise from a centralized  
2 policy or practice on the part of RGIS.

3 Having found that there is evidence of a common policy, the Court turns to whether the  
4 questions that arise from this common policy predominate over individualized inquiries. The  
5 declarations provided by the parties show that the practices of RGIS managers with respect to  
6 donning and waiting time have varied. Many auditors apparently were not paid for donning and  
7 waiting time whereas others were compensated for this time. This is likely a result of the fact that  
8 RGIS' policy was ambiguous. Emails sent by corporate headquarters such as those cited above may  
9 have added to the confusion. The result is that although there are important common questions of  
10 law and fact relating to Plaintiffs' donning and waiting time claims, it is a close call whether the  
11 class action mechanism offers a superior mechanism for resolving the claims of the putative class.  
12 In resolving this question, the Court finds the reasoning of the district court in *Frank v. Gold'n*  
13 *Plump Poultry, Inc.*, 2007 U.S. Dist. LEXIS 71179 (D. Minn. September 24, 2007) to be instructive.

14 In *Frank*, the court addressed the question of whether a class should be decertified under the  
15 FLSA with respect to the plaintiffs' donning time claims. There, the employer, Gold'n Plump,  
16 asserted that it had no overall policy at the corporate level about how (or whether) to pay for  
17 donning and doffing time, instead leaving the question to individual supervisors to resolve. *Id.* at \*  
18 8. As a result, it argued, members of the class were subject to widely differing practices as to  
19 payment for donning time. *Id.* The court, however, concluded that the class should not be  
20 decertified, reasoning as follows:

21 [E]ven if Gold'n Plump is correct, it *does* have a policy – a policy not to have a policy. . .  
22 .The bottom line is that Gold'n Plump has, at a minimum, decided not to require that its  
23 employees be paid for donning and doffing. That no-policy policy has allegedly injured all  
24 members of the putative class and is properly challenged through a class action. It is true . .  
25 .that the payment practices of supervisors vary in some respects. . . . The varying practices of  
the supervisors may mean that some employees have less damages than others – or  
conceivably that some employees have no damages at all. But it does not detract from the  
point that Gold'n Plump has not adopted a corporate policy requiring that employees be paid  
for donning and doffing time.

26 *Id.* at \*9-10. The court in *Frank* went on to note that the defenses that the employer asserted,  
27 including the *de minimis* defense, raised common issues of fact that further supported the conclusion  
28 that certification was appropriate. *Id.* at \* 10.

1       The Court finds that the reasoning offered in *Frank* applies equally here. There is evidence,  
2 in the form of policy documents issued by RGIS headquarters, that RGIS has decided not to require  
3 that its employees be paid for donning and waiting time. There is also evidence from which a jury  
4 conclude that this policy has resulted in a widespread practice on the part of RGIS of failing to  
5 compensate class members for this time. Under those circumstances, the Court concludes that both  
6 the commonality requirement of (a)(2) and predominance requirement of (b)(3) of Rule 23 are  
7 satisfied as to donning and waiting time, notwithstanding the individual issues that will have to be  
8 addressed with respect to damages.

9                               **b.       Travel Related Time**

10       Plaintiffs argue that common questions of law and fact predominate with respect to travel  
11 time because RGIS has a uniform policy of paying for travel time only where it exceeds one hour in  
12 each direction. *See* Lee Rule 23 Decl., Ex. 2 (March 2004 Auditor's Handbook) at 18-19. Plaintiffs  
13 further point to declarations by their expert, Marc Bendick, concluding that the average commute  
14 time for within virtually all of the RGIS districts in the Rule 23 States is less than one hour.  
15 Defendants, on the other hand, point to evidence showing that RGIS employees are not required to  
16 use the meet sites for which this policy applies and that in fact, many employees do not do so,  
17 instead driving themselves to the inventory sites or taking public transportation. They also argue  
18 that there is no evidence employees perform any compensable work while traveling and therefore  
19 that RGIS is not required to pay for this time. In support of the assertion that its travel time policy is  
20 lawful, RGIS also cites to *Worley* and *Johnson*, in which district courts in California and Texas have  
21 found that RGIS' travel policy is lawful.

22       The Court finds that although the requirements of subsection (a)(2) are likely met, it is a  
23 close call whether Plaintiffs have established that common questions predominate as to travel time  
24 under subsection (b)(3). As a preliminary matter, the Court notes that while RGIS has argued at  
25 length that there is significant variation in the experiences of RGIS employees with respect to travel  
26 time, RGIS focuses almost entirely on variations with respect to: 1) whether RGIS-sponsored  
27 transportation is offered to particular inventories and within particular districts; 2) whether RGIS  
28 employees have chosen to use it; and 3) the time that might be considered to be a reasonable

1 commute time in different districts. However, RGIS does not dispute that as to the employees who  
2 use the company transportation, the vast majority of employees are not paid for the first hour of  
3 travel time in each direction, consistent with RGIS' official policy. Conversely, Plaintiffs do not  
4 dispute that employees are not required to use transportation offered by RGIS, or even to work at  
5 inventories that are not local. As a result, the claims of all plaintiffs who used RGIS transport will  
6 turn on a common question, namely, does an employer who offers voluntary transportation to work  
7 sites violate state wage laws by denying compensation for the first hour of travel time in each  
8 direction.

9 To determine whether this common question is sufficient to justify certification, the Court  
10 would ordinarily turn to the state laws of the Rule 23 States to gain a better understanding of the  
11 contours of Plaintiffs' claims and the likely defenses that will arise. Unfortunately, Plaintiffs have  
12 provided very little briefing addressing the legal requirements governing compensation for commute  
13 time in the Rule 23 States. Instead, the parties have devoted most of their briefing to the question of  
14 whether an hour is a reasonable commute time without framing their discussion in terms of the  
15 relevant states' laws.

16 The only discussion of the relevant state law the Court has found in the briefs is the  
17 discussion of the California Superior Court's decision in *Worley*. In *Worley*, the plaintiff was an  
18 RGIS employee who worked in California and sued under state law, alleging that RGIS' travel time  
19 policy was unlawful. *Worley v. RGIS*, Case No. 137454 (Butte County Super. Ct., Aug. 2, 2007).  
20 The court disagreed, granting summary judgment in favor of RGIS that "RGIS' policy of paying  
21 only for travel time in excess of the first hour of travel time *en route* to and from a 'meet site' does  
22 not violate California law in that it simply ensures that employees who choose to work more remote  
23 travel sites receive additional monies in excess of their legally required compensation." *Id.* at 4. In  
24 reaching this conclusion, the court relied on cases that hold that non-compulsory travel to and from  
25 work sites is not compensable under California law. *Id.* (citing *Overton v. Walt Disney Company*,  
26 136 Cal. App. 4<sup>th</sup> 263, 274 (2006) and *Morillon v. Royal Packing co.*, 22 Cal. 4<sup>th</sup> 575, 594 (2000)).  
27 The court expressly rejected the plaintiff's focus on what constituted a reasonable commute,  
28 explaining that this was not the relevant inquiry:



1 It is undisputed that RGIS offers its employees the option to use company-provided  
 2 transportation but does not require that they do so. Under circumstances such as these, and  
 3 employer is not obligated to pay travel time, regardless of whether it is objectively or  
 4 subjectively a “reasonable commute.” Neither an objective measure of the “reasonableness”  
 5 of the travel time (the distance), nor a subjective measure (whether an employee could or  
 6 would take alternate transportation), are determinative of the compensable nature of travel;  
 7 rather, it is whether or not employees are “free to choose – rather than required – to ride their  
 8 employer’s buses.”

9 *Id.* at 3-4.

10 In rejecting the result in *Worley*, Plaintiffs cite to an opinion letter issued by the California  
 11 Division of Labor Standards in which it is stated that “travel involving a substantial distance from  
 12 the assigned work place to a distant work site to report to work on a short-term basis is compensable  
 13 travel time.” DLSE Opinion Letter, April 22, 2003 (2003 Cal. DLSE LEXIS 22). The Court notes,  
 14 however, that the DLSE Opinion Letter, like *Worley*, focuses on the question of whether or not  
 15 travel time is compulsory under the *Morillon* analysis.

16 Both the *Worley* decision and the DLSE opinion letter persuade the Court that for the  
 17 California Rule 23 proposed class, liability on the commute time claims of the auditors who use  
 18 RGIS sponsored transportation will turn on the same issue for all: whether use of that transportation  
 19 is “compulsory” within the meaning of *Morillon*. Defendants have not persuaded the Court that  
 20 individualized inquiries will be required to address this question. Therefore, the Court concludes  
 21 that the California Rule 23 class satisfies the commonality and predominance requirements of  
 22 subsections (a)(2) and (b)(3) of Rule 23. As Plaintiffs have failed to address the relevant state laws  
 23 of the other Rule 23 states, however, the Court concludes that the requirements of subsections (a)(2)  
 24 and (b)(3) are not met as to those states.

#### 25 **c. Meal Breaks**

26 Plaintiffs seek certification of the meal break claims based on the assertion that all of the  
 27 Rule 23 States require that non-exempt employees be “afforded” meal periods of thirty minutes  
 28 during which they are completely relieved of duty. Rule 23 Motion at 36. As evidence that RGIS  
 has a widespread practice of violating this requirement, Plaintiffs cite to the findings of Dr. Drogin  
 that RGIS’ own payroll data indicates that between 4% and 26.1% of the time, meal breaks were  
 missed without any waiver noted. *See* Drogin Rule 23 Decl., ¶ 11. Defendant argues that because

1 employers are required only to *offer* meal breaks and are not required to *ensure* that the breaks are  
 2 actually taken, Plaintiffs' statistical evidence, even if correct, does not support the conclusion that  
 3 common issues predominate. In particular, they argue that the claims will turn largely on  
 4 individualized inquiries regarding the reason the meal break wasn't taken and whether or not it was  
 5 waived.

6 As a preliminary matter, the Court notes that once again, the briefs have focused almost  
 7 entirely on California law. Plaintiffs have not offered a meaningful discussion of the requirements  
 8 of Illinois, Washington or Oregon with respect to meal breaks and particularly, whether those states  
 9 require that meal breaks be only *offered* or if employers must ensure that meal breaks are actually  
 10 taken. Indeed, as to Illinois, Plaintiffs have not even cited the relevant authority in their Rule 23  
 11 Motion on which their claim is based. For this reason alone, Plaintiffs have failed to meet their  
 12 burden as to the Rule 23 states other than California.

13 With respect to California, the parties dispute whether state law requires employers merely to  
 14 offer meal breaks or rather, to ensure the meal breaks are actually taken. Plaintiffs cite to *Cicairos v.*  
 15 *Summit Logistics, Inc.*, in which a California court held that employers do not comply with  
 16 California law when they assume meal periods are taken because they have "an affirmative  
 17 obligation to ensure workers are actually relieved of all duty." 133 Cal. App. 4<sup>th</sup> 949, 962 (2005).  
 18 RGIS, however, points to at least two district courts that have refused to follow *Cicairos*, finding  
 19 that if faced with the issue, the California Supreme Court would "require only that an employer *offer*  
 20 meal breaks, without forcing employers actively to ensure that workers are taking these breaks."  
 21 *White v. Starbucks Corp.*, 497 F. Supp. 2d 1080, 1088 (N.D. Cal. 2007); *see also Brown v. Federal*  
 22 *Express Corp.*, 249 F.R.D. 580 (C.D. Cal. 2008).<sup>24</sup> Both courts look to the language of the relevant  
 23 statutes and regulations, finding that they require only that employers offer meal breaks. The two  
 24 courts also point out that *Cicairos* relied entirely on a non-binding opinion letter by the Department  
 25 of Industrial Relations and that even the language of that letter is consistent with the conclusion that  
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27 <sup>24</sup>RGIS also relied on *Brinker Restaurant Corp. v. Superior Court*, 2008 WL 2806613 (Cal. App.  
 28 4<sup>th</sup> Dist.). That case may no longer be cited, however, as the California Supreme Court accepted review  
 of the appellate court's decision on October 22, 2008.

1 meal breaks must only be offered. The Court finds the reasoning in *White* and *Brown* to be  
2 persuasive and concludes that under California law an employer must offer meal breaks but is not  
3 required to force employees to take them.

4 Because the Court finds that employees must be offered, but need not be forced to take a  
5 meal break, the Court also concludes that many individualized inquiries will be necessary, at least as  
6 to the California class, to determine the reason meal breaks were missed and whether they were  
7 waived. Although Plaintiffs' expert states that he counted only missed meals where a waiver was  
8 not expressly indicated in the payroll records, RGIS will, nonetheless, be entitled to present  
9 individualized evidence that these meal periods were, in fact, offered and not taken. In the absence  
10 of any explicit policy on the part of RGIS to which the missed meals can be attributed and in light of  
11 the individualized inquiries necessary to evaluate the practices of RGIS as to employee meal breaks,  
12 the Court concludes that Plaintiffs' meal break claims do not meet the requirements of Rule  
13 23(b)(3).<sup>25</sup>

#### 14 **d. Inaccurate Payroll Records**

15 Plaintiffs argue that class certification is warranted on the basis of evidence that RGIS does  
16 not keep accurate payroll records. Plaintiffs cite to statistical analyses by their expert, Dr. Drogin,  
17 which Plaintiffs assert show that RGIS has a pattern or practice of undercompensating its  
18 employees. Plaintiffs also cite to RGIS' standard wage statement, which they assert fails to comply  
19 with the state laws of the Rule 23 States requiring itemization of wage statements. The Court  
20 rejects Plaintiffs' assertions except as to their claim for failure to itemize under California law.

21 In his first declaration, Dr. Drogin cites statistical evidence regarding employee sign-out  
22 times and vehicle return times that he concludes are implausible, as well as missing time records for  
23 over 4,000 RGIS auditors, both of which lead Dr. Drogin to conclude that RGIS has engaged in a  
24 widespread practice of falsifying time records. In his reply declaration, Dr. Drogin analyzes pay  
25 records that RGIS produced in July 2008, concluding that RGIS has significantly undercompensated  
26

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27 <sup>25</sup>The Court notes that its decision on this issue (as on class certification in general) may be  
28 revisited at a later time - - once the California Supreme Court has ruled on its review of the *Brinker*  
decision.

its auditors. RGIS challenges the reliability of Dr. Drogin's reply declaration and argues that in any event, it is insufficient to establish the existence of common questions of law or fact that justify class certification.

The Court concludes that RGIS is correct. Even assuming that all of Dr. Drogin's statistics are correct, it is not possible to determine the reason for the undercompensation from the statistics offered. Indeed, there could be a multitude of explanations for the undercompensation. As a result, the Court is not persuaded that this data is sufficient to satisfy Rule 23(b)(3).

With respect to the assertion that there are common questions relating to Plaintiffs' itemization claims, the Court notes that Plaintiffs asserted such a claim only under California law in its complaint. *See* First Amended Consolidated Complaint, Claim 7. As Plaintiffs failed to assert similar claims based on the laws of the other Rule 23 States, the Court declines to consider Plaintiffs' request that Rule 23 classes be certified for those states based on the alleged failure to itemize. As to the California class members, however, there is a common question that predominates, namely, does the standardized wage form that is used by RGIS for all of its employees comply with the requirements of California Labor Code § 226 that employers must provide properly itemized wage statements. As to that claim, the commonality and predominance requirements of (a)(2) and (b)(3) are met.

#### 4. Typicality

Plaintiffs must also establish that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R.Civ. P. 23(a)(2). The standard is permissive: "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Having reviewed the declarations of the proposed class representatives, the Court concludes that the typicality requirement is met as to the donning and waiting time claims and, for the California class representatives, the travel and itemization claims.<sup>26</sup> *See Dukes v. Wal-Mart*, 509

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<sup>26</sup>Plaintiffs shall be permitted to amend their complaint to add the proposed class representatives who have not been named as plaintiffs, that is Carol Molmen, Joan Johnson, Latonia Williams, Jewel Gatlin and Michael Zustak.

1 F.3d 1168, 1184 (9<sup>th</sup> Cir. 2007) (holding that the discrimination claims asserted by female employees  
 2 of Wal-Mart were typical of the claims of the class even though “individual employees in different  
 3 stores with different managers may have received different levels of pay or may have been denied  
 4 promotion or promoted at different rates, because the discrimination they allegedly suffered  
 5 occurred through an alleged common practice-e.g., excessively subjective decision-making in a  
 6 corporate culture of uniformity and gender stereotyping”). The Court rejects RGIS’ argument that  
 7 the typicality required is not met because Plaintiffs do not have a class representative from each job  
 8 category. As the Ninth Circuit explained in *Dukes*, where employees are subject to a uniform  
 9 wrongful policy, the lack of a class representative at each management level does not defeat  
 10 certification.

### 11 5. Adequacy of Representation

12 Rule 23(a)(2) requires that “the representative parties will fairly and adequately protect the  
 13 interests of the class.” To satisfy this requirement, Plaintiffs must establish that: 1) the class  
 14 representatives do not have a conflict of interest; and 2) class counsel will adequately represent the  
 15 interests of the class. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9<sup>th</sup> Cir. 1978).  
 16 Here, RGIS has asserted that the first requirement is not met because the named plaintiffs have a  
 17 conflict of interest, specifically, they seek to represent both an opt-in class under Rule 23 and an opt-  
 18 out class under the FLSA. RGIS further challenges the qualifications and experience of Plaintiffs’  
 19 counsel. The Court rejects both arguments.

20 First, while concerns have been expressed by some courts regarding the propriety of  
 21 allowing plaintiffs to prosecute both opt-in and opt-out claims in the same action, *see, e.g., Leuthold*  
 22 *v. Destination America, Inc.*, 224 FRD 462, 469-71 (N.D. Cal. 2004), the majority of courts,  
 23 including courts in this district, have concluded that the two types of actions are not inconsistent.  
 24 *See, e.g., Ellison v. Autozone*, 2007 WL 2701923 \* 2 (N.D. Cal. Sept. 13, 2007); *Baas v. Dollar Tree*  
 25 *Stores, Inc.*, 2007 WL 2462150 (N.D. Cal. Aug. 29, 2007); *Lindsay v. Government Employees Ins.*

1 Co., 448 F.3d 416, 424 (D.C. Cir. 2006). The Court finds the reasoning of these cases persuasive  
2 and finds no conflict of interest here.<sup>27</sup>

3 Second, the Court has reviewed the evidence presented by Plaintiffs regarding the  
4 qualifications and experience of class counsel. The Court concludes that Plaintiffs' counsel is well-  
5 qualified to represent Plaintiffs' interests and will advocate vigorously for Plaintiffs.

6 Accordingly, the Court finds that Rule 23(a)(2) is satisfied.

### 7 8 **6. Superiority and Manageability**

9 The Court also concludes that a class action is superior to the other available methods of  
10 resolving the claims of the class certified by this order. The alternative – hundreds or even  
11 thousands of individual actions – is not realistic. Not only might they never be brought given the  
12 limited amount at stake for each individual, but the enormity of the resources required to adjudicate  
13 such claims, and the risk of inconsistent outcomes, counsels in favor of class treatment. Based on  
14 the information currently before the Court, a class action is also manageable. With the  
15 predominance of common issues, and the various methods available to the parties and to the court  
16 for proving and deciding these class claims, the Court concludes at this point that a class action is  
17 workable. *See, e.g., Dukes v. Wal-Mart, Inc., supra*, 509 F. 2d at 1190-1193.

### 18 **7. Whether Rule 23(b)(2) is Met**

19 Plaintiffs argue that even if the requirements of Rule 23(b)(3) are not satisfied, the proposed  
20 classes should be certified because subsection (b)(2) is met. That section provides that where the  
21 requirements of Rule 23(a) are met, a class action may be maintained where “the party opposing the  
22 class has acted or refused to act on grounds that apply generally to the class, so that final injunctive  
23 relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R.  
24 Civ. P. 23(b)(2). The Court disagrees.

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25  
26 <sup>27</sup>In *Lindsay*, the court of appeals noted that while the FLSA claims were not inconsistent with  
27 the state law claims in that case, the district court could nonetheless choose to decline to exercise  
28 supplemental jurisdiction under 28 U.S.C. § 1367(c) if it found, on remand, that the state law claims  
were either novel or complex or predominated over the FLSA claims. 448 F.3d at 424-425. The Court  
in this case does not find that either of these justifications for declining to exercise supplemental  
jurisdiction is present here.

1 In *Molski v. Gleich*, the Ninth Circuit explained that a class may be certified under Rule  
2 23(b)(2) where the plaintiffs seek both injunctive relief and monetary damages, so long as the  
3 monetary damages claim is secondary to the claim for injunctive relief. 318 F.3d 937, 947 (9<sup>th</sup> Cir.  
4 2003). In *Dukes*, the court of appeals explained that *Molski* does not set forth a bright line test for  
5 determining when the damages claims are incidental to the relief requested because such a test  
6 would conflict with the discretion vested in the district court. 509 F.3d at 1185. The court  
7 continued:

8 Instead, we examine the specific facts and circumstances of each case, focusing  
9 predominantly on the plaintiffs' intent in bringing the suit. . . At a minimum, however, we  
10 must satisfy ourselves that: (1) even in the absence of a possible monetary recovery,  
11 reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought;  
12 and (2) the injunctive or declaratory relief sought would be both reasonably necessary and  
13 appropriate were the plaintiffs to succeed on the merits.

14 *Id.* (citations omitted).

15 Based on the specific facts and circumstances of this case, the Court concludes that the claim  
16 for damages is not incidental to the request for injunctive relief but rather, a driving force behind  
17 these consolidated actions. Although Plaintiffs have now proposed class representatives who are  
18 current employees, the vast majority of the named plaintiffs in the Consolidated Complaint are not  
19 current employees and therefore are not entitled to injunctive relief. This fact alone suggests that the  
20 injunctive relief sought in the complaint was not the primary relief sought in this action. The Court  
21 also notes that even as to donning and waiting time, the need for injunctive relief appears to have  
22 diminished as RGIS has recently clarified its policy to require that this time be paid. The Court  
23 therefore finds that Rule 23(b)(2) is not satisfied.

## 24 **8. Certification**

25 The Court therefore certifies, under Rule 23, the following classes:

- 26 1. All hourly Auditors, Assistant Team Leaders, Team Leaders and Assistant Area  
27 Mangers employed by RGIS in California on or after January 1, 2005 with respect to  
28 the claims asserted in the Consolidated Complaint arising out of (1) donning and  
related waiting time from the time that equipment is made available for donning, (2)  
unpaid travel time on company provided travel for the first hour of travel to and the  
first hour of travel from an inventory site, and (3) the alleged failure to comply with



the requirements of California Labor Code section 226 that employers must provide properly itemized wage statements.

2. All hourly Auditors, Assistant Team Leaders, Team Leaders and Assistant Area Mangers employed by RGIS in Oregon on or after September 20, 2000 with respect to the claims asserted in the Consolidated Complaint arising out of donning and related waiting time from the time that equipment is made available for donning.
3. All hourly Auditors, Assistant Team Leaders, Team Leaders and Assistant Area Mangers employed by RGIS in Washington on or after September 20, 2003 with respect to the claims asserted in the Consolidated Complaint arising out of donning and related waiting time from the time that equipment is made available for donning.
4. All hourly Auditors, Assistant Team Leaders, Team Leaders and Assistant Area Mangers employed by RGIS in Illinois on or after January 4, 2000 with respect to the claims asserted in the Consolidated Complaint arising out of donning and related waiting time from the time that equipment is made available for donning.

### **C. The Motion to Decertify**

#### **1. Legal Standard**

Section 16 of the FLSA permits workers to sue their employers for unpaid wages on their own behalf and on behalf of “other employees similarly situated.” 29 U.S.C. § 216(b). Any employee who wishes to participate in such a collective action is required to give consent in writing and file that consent in the court in which the action is brought. *Id.* District courts in the Ninth Circuit have generally applied an “ad hoc two- tiered approach” in determining whether the plaintiffs are similarly situated. *Gerlach v. Wells Fargo & Co.*, 2006 WL 824652 (N.D. Cal. March 28, 2006) at \* 2 (citing *Wynn v. Nat’l Broad. Co., Inc.*, 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002) (noting that majority of courts prefer this approach)). Under this approach, the district court makes two determinations. *Id.* First, the court determines whether a collective action should be certified for the purpose of sending notice to potential class members (“the notice stage”). *Id.* At this stage, the standard is lenient, requiring “little more than substantial allegations, supported by declarations or discovery, that ‘the putative class members were together victims of a single decision, policy, or

plan.”” *Id.* (citing *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001)).

Second, after discovery has concluded, the court revisits the question of whether the class meets the “similarly situated” requirement, this time applying a stricter standard. *Id.* This second determination involves a review of several factors, including “the disparate factual and employment settings of the individual plaintiffs; the various defenses available to the defendant which appear to be individual to each plaintiff; fairness and procedural considerations; and whether the plaintiffs made any required filings before instituting suit.” *Id.* If the court finds that the standard is not met, the class will be decertified. *Id.*

## 2. The Court’s Order Granting Motion to Facilitate Notice

On December 19, 2007, the Court conditionally certified two classes under the FLSA on the basis that Plaintiffs had made the necessary threshold showing of a uniform policy or practice with respect to: 1) donning time; 2) time spent waiting for inventories to begin at local inventories; 3) time spent waiting for transportation; and 4) time spent engaged in transportation to travel inventories. The classes were defined as follows:

1) All non-exempt hourly employees of RGIS Inventory Specialists, now operating as RGIS, LLC, who were, are, or will be employed as auditors during the period of three years prior to the commencement of this action through the date of judgment of this action.

2) All non-exempt hourly employees of RGIS Inventory Specialists, now operating as RGIS, LLC, who were, are, or will be employed as assistant [ ] team leaders, team leaders, and assistant or associate area managers of RGIS during the period of three years prior to the commencement of this action through the date of judgment of this action.

Order Granting Motion to Facilitate Notice Pursuant to 29 U.S.C. § 216(b), filed December 19, 2007 (“Order Facilitating Notice”) at 3.

## 3. Whether Plaintiffs are Similarly Situated Under the FLSA

The Court conditionally certified two nationwide classes under the FLSA as to claims based on alleged donning and waiting and travel time violations. In certifying these classes, the Court applied a lenient standard, relying on evidence that RGIS had failed to compensate numerous plaintiffs for donning time, time spent waiting for inventories at local inventory sites, time spent waiting for transportation to travel sites and time spent in transport. The Court now revisits the

1 question of certification, applying a more stringent standard, to determine whether the claims of the  
2 class members are sufficiently alike to allow the Court to efficiently manage the case. The Court  
3 concludes that only the specific claims discussed in connection with the Rule 23 Motion based on  
4 pre-inventory donning and waiting time and travel time meet this requirement.<sup>28</sup>

5 As discussed above, the evidence reveals a variety of experiences, both as to donning and  
6 waiting time and as to travel time. As to donning time, however, there is evidence that violations  
7 alleged by Plaintiffs are attributable to a uniform policy adopted by RGIS of requiring auditors to be  
8 ready to start counting, with equipment already donned, at the inventory start time. This policy  
9 allegedly has resulted in unpaid donning time and associated waiting time. This common policy has  
10 allegedly inflicted harm on all class members. Further, RGIS asserts at least some common defenses  
11 to the policy, for example, that donning time is *de minimis* and therefore not compensable. On the  
12 basis of this evidence of a common policy, the Court concludes that Plaintiffs are entitled to  
13 maintain their class status as to the pre-inventory donning and waiting time claims attributable to  
14 this policy under the FLSA.<sup>29</sup>

15 The Court also concludes that Plaintiffs may proceed on a class basis on the travel time claim  
16 discussed above, namely, that the policy of considering the first hour of travel time as non-  
17 compensable travel time is unlawful. Under the FLSA, the crucial inquiry will be whether or not  
18 time spent commuting to travel inventories falls under the Portal-to-Portal Act, 29 U.S.C. § 254(a),  
19 which provides that activities that are “preliminary” or “postliminary” to an employee’s principal  
20 activities are not compensable under the FLSA. The Supreme Court has held that an exception to  
21 this rule exists where the travel is “integral and indispensable” to a “principal activity.” *IBP, Inc. v.*  
22 *Alvarez*, 546 U.S. 21, 37 (2005). This question will turn on common questions of fact relating to the  
23 type of work that RGIS auditors perform, the expectations within the industry and the company and  
24

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25  
26 <sup>28</sup>Although the Court has found that a class should be certified under Rule 23 as to the California  
27 plaintiffs based on alleged failure to itemize, no corresponding class has been certified under FLSA .  
Therefore, the Court need not reach whether it should *decertify* such a claim under the FLSA.

28 <sup>29</sup>To the extent that Plaintiffs’ claims under the FLSA relating to donning and waiting time  
purport to sweep more broadly than stated above, the Court GRANTS the Motion to Decertify.

whether auditors perform any work while in transit. This common legal and factual question justifies class certification under the FLSA.<sup>30</sup>

Accordingly, the Court declines to decertify the FLSA classes except to the extent that the claims of the FLSA plaintiffs purported to sweep more broadly than the claims set forth above.

#### **D. The Motion to Bifurcate**

Plaintiffs seek to bifurcate the liability and damages portions of the trial. The Court concludes that the motion is premature and therefore DENIES the motion without prejudice.

#### **E. The Motion to Dismiss**

RGIS brings a motion to dismiss seeking to dismiss various opt-in plaintiffs on a variety of grounds. It is apparent that many of the issues raised in the motion are premature and others could have been resolved by the parties without Court intervention. The Motion to Dismiss is DENIED without prejudice. Prior to refileing the motion, lead counsel shall meet and confer, in person, to attempt to resolve the issues raised in the motion.

#### **IV. CONCLUSION**

The Rule 23 Motion [docket no. 403] is GRANTED in part and DENIED in part. The Motion to Decertify [docket no. 569] is GRANTED in part and DENIED in part. The Motion to Bifurcate [docket no. 413] and the Motion to Dismiss [docket no. 586] are DENIED without prejudice. The Motions to Strike [docket nos. 528, 481, 570, 614 and 664] are DENIED.

The parties are instructed to meet and confer and submit to the Court within the next fourteen (14) days a proposed schedule for the remainder of the case, including dates for submitting to the Court a proposed notice to class members.

IT IS SO ORDERED.

Dated: February 6, 2009

  
JOSEPH C. SPERO  
United States Magistrate Judge

<sup>30</sup>Again, to the extent that Plaintiffs' claims under the FLSA relating to travel time purport to sweep more broadly than stated above, the Court GRANTS the Motion to Decertify.